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November 17, 2011

The Honorable Jocelyn G. Boyd
Chief Clerk and Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: ***Application Regarding the Acquisition of Progress Energy, Incorporated by Duke Energy Corporation and Merger of Progress Energy Carolinas, Incorporated and Duke Energy Carolinas, LLC*, Docket No. 2011-158-E**

Dear Ms. Boyd:

Attached for filing in the above-referenced docket is the Direct Testimony of John Bagwell on behalf of the City of Orangeburg, South Carolina. This testimony is being served on the parties to this proceeding.

Thank you for your attention to this matter. Please contact the undersigned with any questions.

Sincerely,

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James N. Horwood
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1333 New Hampshire Avenue NW
Washington, DC 20036
Attorneys for the City of Orangeburg, South Carolina

Attachments

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2011-158-E

In the Matter of: Application Regarding the Acquisition of Progress Energy, Incorporated by Duke Energy Corporation and Merger of Progress Energy Carolinas, Incorporated and Duke Energy Carolinas, LLC	**DIRECT TESTIMONY OF JOHN BAGWELL, CITY OF ORANGEBURG, SOUTH CAROLINA**

Q. PLEASE STATE YOUR NAME, ADDRESS AND POSITION WITH THE CITY OF ORANGEBURG, SOUTH CAROLINA.

A. My name is John Bagwell. I am the Director of the Electric Division of the City of Orangeburg, South Carolina Department of Public Utilities ("DPU" or "Orangeburg"), located at 1016 Russell Street, Orangeburg, South Carolina 29115.

Q. PLEASE DESCRIBE YOUR EDUCATION AND PROFESSIONAL AFFILIATIONS.

A. I have an Associate in Liberal Arts degree from Spartanburg Methodist College, in Spartanburg, South Carolina. I have a Bachelor of Science degree in Electrical Engineering from Clemson University located in Clemson, South Carolina. I have been a member of the American Public Power Association since 1989. I am a member and past president of the South Carolina Association of Municipal Power Systems.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND.

A. I am currently employed by the DPU as the Director of the Electric Division and have been in this position since July of 1998. Before that, I was the Control Systems Superintendent for the DPU since January of 1987.

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to provide the Commission with information about the negative impacts on DPU and its customers of the Joint Dispatch Agreement ("JDA"), as read together with the Regulatory Conditions agreed to by Duke Energy Carolinas, LLC ("Duke"), Progress Energy Carolinas, Inc. ("Progress") and the North Carolina Utilities Commission ("NCUC") Public Staff (referred to hereafter as "proposed North Carolina Regulatory Conditions" and attached hereto as Bagwell Exhibit 1), that is associated with the proposed merger between the parent companies of Duke and Progress. The JDA, if approved in its current state will, together with the proposed North Carolina Regulatory Conditions, effectively prevent both Duke and Progress from offering to sell low-cost power to DPU and other utilities who are not "Native Load Customers" as defined in that document. Therefore, this Commission's approval of the JDA without modification will greatly impact the wholesale power market – not only in the Carolinas, but throughout the Southeast – by removing two major power supply competitors, and has the potential to increase electricity costs for DPU's retail customers.

Q. WHAT WAS YOUR ROLE IN NEGOTIATING THE CONTRACTS DISCUSSED LATER IN YOUR TESTIMONY?

A. I was Orangeburg's lead negotiator for both the 2008 Duke-Orangeburg agreement and the 2010 SCE&G-Orangeburg agreement.

Q. PLEASE DESCRIBE DPU AND ITS ELECTRIC SYSTEM.

A. DPU is an enterprise function of the City of Orangeburg, governed by the City's Mayor and City Council, and has been operating for over 100 years. DPU provides electric, natural gas, water and wastewater services to customers in the City of Orangeburg and Orangeburg County, and water services to some portions of neighboring Calhoun County. DPU's electric system consists of twenty-two distribution substations, fifty miles of transmission lines, 800 miles of distribution lines, and approximately 23.5 megawatts (MW) of generation capacity. The generation facilities are located at three sites and include two diesel reciprocating engines (totaling approximately 14 MW); two gas turbines (totaling approximately 7.5 MW) and one gas-fired reciprocating engine (approximately 2 MW).

Q. PLEASE DESCRIBE DPU'S ELECTRIC CUSTOMERS.

A. The Electric Division of DPU serves approximately 25,000 residential, industrial and commercial customers – a population of about 75,000 people. The majority (over 20,000) of those customer accounts are residential, but 4000 are commercial. DPU's industrial load is substantial: our 100 industrial customers account for half of DPU's total kilowatt hour sales. DPU's ten largest customers are the largest employers in the Orangeburg area, and some of the largest employers in the state: Albermarle Corporation, American Koyo Bearing Mfg Co., Husqvarna Outdoor Products, The Okonite Company, South Carolina State University, Federal-Mogul Corporation, the Regional Medical Center of Orangeburg & Calhoun Counties, Mars Petcare US, Inc., Allied Air Enterprises Inc., and Dempsey Wood Products.

Q. WHAT IS DPU'S APPROXIMATE LOAD AND PROJECTED LOAD GROWTH?

A. DPU's total peak load in 2011 has been 182 MW. DPU is predicting a slow growth rate over the next ten years of approximately 1% - 1.5% per year.

Q. HOW HAS DPU TRADITIONALLY SECURED POWER SUPPLIES FOR ITS CUSTOMERS?

A. DPU has been a long-time customer of South Carolina Electric & Gas Company ("SCE&G") and its predecessors, since around 1919. Until 1997, DPU purchased its electric energy requirements under SCE&G's FERC-filed wholesale electric rate schedule (WR Rate). As a practical matter, it was essentially impossible for Orangeburg to purchase long-term power supplies from any supplier other than SCE&G before that time.

Q. HAS DPU ATTEMPTED TO SECURE POWER FROM OTHER SOURCES?

A. Yes. In 1996, DPU, as a result of regulatory changes by FERC permitting market rate-based sales and promoting open access to transmission services, issued a request for proposals ("RFP") for wholesale electric service. The RFP was well-received by a number of wholesale suppliers across the Southeast. After review and analysis of the proposal, DPU entered into a market based rate contract with

SCE&G. The contract began April 30, 1997 and was scheduled to end April 30, 2003. The contract was extended twice, once in May of 2001 and then again in August of 2003. The 2003 extension allowed the contract to continue until April 30, 2009. In 2007, knowing that the SCE&G contract would end in 2009, DPU informally asked Duke, SCE&G, Southern Company and several independent power producers to provide proposals for wholesale power supply. DPU received proposals from Duke and SCE&G. After evaluating the proposals from Duke and SCE&G (including an updated proposal from SCE&G), DPU determined that Duke's proposal was the more favorable and proceeded to enter into contract negotiations with Duke.

Q. PLEASE DESCRIBE THE POWER PURCHASE AGREEMENT ORANGEBURG ENTERED INTO WITH DUKE.

A. The Duke–Orangeburg PPA was an approximately ten-year contract. The total dollar amount of the contract was valued at about $500 million. The contract was a full requirements power supply agreement priced based on Duke's average system cost of power. The contract was set to take effect May 1, 2009 and end December 31, 2018. Other terms included Duke's ability to schedule DPU's entitlement of energy from the Southeastern Power Administration and to dispatch DPU's generation. The contract also allowed Duke to have operational control over any Demand Side Management programs DPU implemented.

Q. WHAT DID DPU SEE AS THE KEY TERMS OF THE PPA?

A. There were two important key terms in the PPA: (1) cost – Duke was to provide DPU with a reasonably priced, dependable source of power over ten years based on system average pricing and (2) native load priority – the contract assured DPU that Duke would have provided the same firmness of supply to DPU as to Duke's retail customers. We anticipated that the Duke-Orangeburg PPA would save DPU and its customers a significant amount of money: approximately $10 million per year as compared to SCE&G's 2007 proposal—nearly $100 million over the life of the Duke contract.

Q. WHAT HAPPENED AFTER DUKE AND ORANGEBURG EXECUTED THE PPA?

A. In June 2008, as required in the NCUC's approval of Duke Energy Corporation's 2006 merger with Cinergy Corp., Duke filed notice of the transaction with the NCUC. Duke and Orangeburg also filed a joint petition for a declaratory ruling that asked the NCUC to clarify how it would treat transactions like Duke's sale to Orangeburg in future retail ratemaking proceedings. In March 2009, the NCUC ruled that Duke could go ahead with the Orangeburg sale if it was willing to sell at a loss by having its retail rates set as if Duke was selling to Orangeburg at higher, incremental costs instead of the system average costs agreed to in the PPA. The NCUC's March 2009 Order is attached as Bagwell Exhibit 2.

Q. WHAT HAPPENED AFTER THE COMMISSION ISSUED THE MARCH 2009 ORDER?

A. On April 9, 2009, Duke notified Orangeburg that it was exercising its right under the contract to provide much higher-priced "contingent service" as a result of the ruling in the March 2009 Order. Fortunately, SCE&G was willing to extend our existing contract until the end of 2010, which allowed us a limited amount of time to seek a new power supply contract to commence in 2011. Because we were able to extend the existing SCE&G contract, DPU declined the contingent service offer from Duke and on April 22, 2009, with the agreement of Duke, terminated the PPA.

Q. WHY WERE THE CONTINGENT SERVICE AND EARLY TERMINATION PROVISIONS INCLUDED IN THE PPA?

A. It was my understanding that Duke was unwilling to risk committing to sell wholesale power at average system cost pricing to Orangeburg and then face an economic loss in the event that the NCUC determined that sales under the Duke-Orangeburg PPA would be treated as having been made at higher costs for purposes of retail ratemaking. DPU needed assurance of adequate power supply and was unwilling to enter into an agreement without such a supply guarantee. DPU accepted the contingent service and early termination provisions because the

alternative for DPU would have been to have no assurance of power supply for us and our customers in the event of an unfavorable ruling from the NCUC on the declaratory order petition. We considered that level of risk unacceptable and therefore accepted the options that would result in higher prices as a fallback, which provided at least a small level of protection in the event that the NCUC in setting Duke's retail rates were to prohibit Duke from recognizing the average system cost pricing we bargained for in the Duke-Orangeburg PPA. The implementation of contingent service and the termination of the Duke-Orangeburg PPA undermined the intensive work that went into negotiating the Agreement and deprived DPU's customers of the core benefit that DPU believed was in their interests: the long-term, average system cost-based sale of wholesale power from Duke to Orangeburg.

Q. WHAT HAPPENED AFTER ORANGEBURG TERMINATED THE PPA?

A. After termination of the PPA and extension of the SCE&G contract, Orangeburg immediately began work to find another power supplier. In July 2010, DPU was approached by SCE&G to add an additional two years to the contract extension SCE&G granted us in April 2009. DPU agreed, extending the new termination date to December 31, 2012. Following the last extension, DPU sent RFPs to Duke, SCE&G and Southern Company once again. This time DPU received bids from SCE&G and Southern Company. Duke declined to bid because of the NCUC's March 2009 ruling. The SCE&G bid was considered by DPU to be the most economical of two, and DPU moved forward with contract negotiations with SCE&G. In January 2011, SCE&G and Orangeburg executed a new power supply agreement, under which SCE&G will sell requirements power to the DPU from January 1, 2012 through December 31, 2022, or December 31, 2023 if SCE&G exercises its right to extend the agreement for an additional year.

Q. GIVEN THAT THE SCE&G CONTRACT EXTENDS FOR AT LEAST ELEVEN YEARS, WHY IS DPU CONCERNED ABOUT THE JDA NOW?

A. Orangeburg has historically met the bulk of its power supply needs from wholesale power purchases and I expect that will also be the case in the future. Given

Orangeburg's power supply needs, eleven years is a relatively short time period. The solicitation and negotiation of a requirements power supply contract takes several years. So, about three years before the new contract with SCE&G expires, DPU will go to the market once again with an RFP for power requirements service, seeking the most economical offer from potential power suppliers in order to try to keep our customers' power costs low.

There is no guarantee that any wholesale suppliers will bid to meet Orangeburg's needs. The market will dictate what offers DPU receives. One thing is clear: without competition, Orangeburg may not have attractive offers to choose from. The JDA, when read together with the proposed North Carolina Regulatory Conditions, will reduce competition by effectively eliminating Duke and Progress as potential system average cost power suppliers for DPU and other similarly situated utilities. They most likely won't even offer to serve Orangeburg, just like Duke declined to respond when DPU sought bids after the 2008 Duke-Orangeburg PPA was terminated.

Because approval of the JDA will set the framework for DPU's future power supply options, it is critical to Orangeburg that the restrictive provisions of the JDA be addressed now. I am concerned that it may be difficult to challenge the application of the JDA and the proposed North Carolina Regulatory Conditions after they have been approved, so Orangeburg would not be able to raise these challenges at the time it is negotiating its next contract, even if it were practical to do so, which it is not. Orangeburg is also objecting to the JDA and the proposed North Carolina Regulatory Conditions in the Duke-Progress parent company merger proceedings at the NCUC, as well as the Federal Energy Regulatory Commission, but I cannot assume we will be successful in those proceedings. Indeed, in a recent order approving the merger transaction subject to certain mitigation requirements, FERC declined to reach the substance of Orangeburg's arguments until a later time. Orangeburg has filed for rehearing of that order at FERC; however, it remains the case that the JDA and the proposed regulatory conditions and their impacts on Orangeburg and Orangeburg's customers should

be addressed in this proceeding. The mitigation steps proposed by Duke and Progress to FERC (which were also filed in this docket on October 17) do not alleviate Orangeburg's concerns.

Q. PLEASE FURTHER EXPLAIN YOUR CONCERNS WITH THE PROPOSED JDA.

A. Orangeburg is concerned that the proposed Joint Dispatch Agreement together with the proposed North Carolina Regulatory Conditions would effectively prevent Duke and Progress from offering to sell requirements power to Orangeburg at system average cost-based prices and instead limit them to selling at incremental cost-based pricing. The JDA states that, for the purposes of calculating Joint Dispatch savings, Native Load Customers are entitled to Duke's and Progress's lowest-priced jointly dispatched power. The JDA defines Native Load Customers as Duke's and Progress's Retail Native Load customers and the wholesale customers that they have the obligation to plan for and treat comparably to their Retail Native Load Customers.

It is my understanding that, at the insistence of the NCUC Public Staff, the JDA was shaped to be read, interpreted and implemented in conjunction with the pre-existing North Carolina regulatory conditions, which are the foundation for the new proposed North Carolina Regulatory Conditions, in order to reserve Duke's and Progress's low-cost power for their retail and wholesale native load customers (comments by NCUC Public Staff to that effect are attached as Bagwell Exhibit 3). The proposed North Carolina Regulatory Conditions list the wholesale customers that automatically qualify for treatment comparable to Duke's and Progress's native load, and require Duke and Progress to give advance notice to the NCUC before granting native load priority to any new wholesale customer. Orangeburg is not on the proposed North Carolina Regulatory Conditions' list of favored wholesale customers, and the NCUC ruled in March 2009 that Orangeburg is not entitled to be treated as Duke's native load for the purposes of long-term planning or least-cost service. So Orangeburg is not, and in all likelihood will not in the future be, considered by the NCUC to be a Native Load Customer under the JDA.

Because only Native Load Customers are allocated low-cost power under the JDA's savings calculation, Duke or Progress could only sell low-cost power to non-native load customers like Orangeburg if they are willing to take a financial loss. For these reasons, Orangeburg cannot expect Duke or Progress to offer low-cost power service if the proposed JDA including the current definition of Native Load Customers, is approved.

For several reasons, the mitigation proposal recently filed by Duke and Progress in response to FERC's order approving the merger transaction does not alleviate Orangeburg's concerns. First, the proposed mitigation consists of a must-offer obligation with respect to short-term, interruptible power, while Orangeburg's concerns relate to the availability of long-term power requirements service. Second, Orangeburg is located outside the Progress Energy Carolinas East and Duke Energy Carolinas balancing authority areas where the must-offer obligation will apply. Finally, because the proposed mitigation would end after eight years, it would not, in the longer-term, affect the power supply options of entities in Orangeburg's position.

As a businessman and public servant, I look for the lowest cost power supply in order to keep DPU's customers' power costs as low as possible while providing reliable service. I want to be able to negotiate with power suppliers, businessman-to-businessman, for the best possible price, which I understand FERC permits me to do with utilities who, like Duke and Progress, have authority to sell wholesale power at market based rates. The JDA, connected as it is with the proposed North Carolina Regulatory Conditions, interferes with my (and Duke's and Progress's) ability to do that. I hope that the State of South Carolina would be concerned about the State of North Carolina deciding what South Carolina wholesale customers are eligible (as a practical matter) to buy low-cost wholesale power from Duke and Progress.

I have a further concern that, under the JDA, in combination with the proposed North Carolina Regulatory Conditions, Duke's and Progress's respective retail and wholesale customers are going to benefit from low-cost power generated from the

facilities of the other utility. In other words, they will benefit from low-cost power from utility facilities whose costs they have not historically supported. If a Progress retail or wholesale customer can benefit under the JDA from cheap power generated by Duke units then why shouldn't Orangeburg be able to do the same?

Q. IS ORANGEBURG CONCERNED ABOUT ITS FUTURE POWER SUPPLY OPTIONS?

A. Yes. We expect SCE&G's wholesale prices to rise – the pricing proposed by SCE&G in 2007 was very expensive. The lower pricing in the new SCE&G contract (as compared to SCE&G's 2007 proposals) was due to several unexpected developments, including the 2008 economic downturn. Even during the term of the new SCE&G contract, we expect prices to go up. Future SCE&G pricing may or may not be more expensive than alternatives, but Orangeburg wants as many realistic alternatives as possible. If more entities are able to compete for Orangeburg's load, we are likely to get better proposed terms and pricing. If there are too few potential suppliers, Orangeburg may find itself forced to purchase at higher prices than a competitive market would produce.

Q. WHAT ARE SOME OF THE IMPACTS ON YOUR CUSTOMERS OF HIGHER WHOLESALE ELECTRIC COSTS?

A: Higher wholesale power costs for DPU result in higher electric rates for DPU's customers. Of course, higher rates are a hardship on DPU's residential customers, many of whom are struggling in these difficult economic times. Higher electric rates also hurt the community by raising costs for DPU's commercial and industrial customers, jeopardizing hundreds of existing jobs. In addition, higher electric rates make it difficult to attract new industry and new jobs to the Orangeburg area. In addition, the JDA hurts the competitiveness of Orangeburg by providing other utilities – mainly North Carolina utilities – with a low-cost wholesale power supply that is not available to DPU. The JDA may cause DPU to lose its substantial industrial load or new industrial customers to utilities who are considered Duke's and Progress's Native Load Customers under the JDA.

Q. WHAT SHOULD THE COMMISSION DO TO ADDRESS YOUR CONCERNS?

A. If the Commission determines that it has the authority to rule on all of the terms of the JDA, it should reject the JDA as not consistent with the public interest because of the negative impacts it will have, when read together with the proposed North Carolina Regulatory Conditions, on the customers of Orangeburg and other similarly situated South Carolina utilities. Alternatively, the Commission should condition any approval of the JDA on the definition of Native Load Customers being revised to add the phrase "irrespective of conditions imposed by, or rulings of, the North Carolina Utilities Commission," so that it would read: "'Native Load Customers' means a Party's Retail Native Load Customers plus its wholesale customers that have Native load served by the Party, for which the party has an obligation pursuant to current or future wholesale contracts, for the length of such contracts, to engage in planning and sell and deliver electric capacity and energy in a manner comparable to the Party's service to its Retail Native Load Customers, *irrespective of conditions imposed by, or rulings of, the North Carolina Utilities Commission*."

Q. DOES THIS CONCLUDE YOUR PREPARED TESTIMONY?

A. Yes, it does.

Exhibit 1

APPENDIX A

ATTACHMENT A
CORRECTED CLEAN

DOCKET NO. E-2, SUB 998
DOCKET NO. E-7, SUB 986

REGULATORY CONDITIONS

SEPTEMBER 2, 2011

(AS CORRECTED SEPTEMBER 15, 2011)

TABLE OF CONTENTS

DOCKET NO. E-2, SUB 998
DOCKET NO. E-7, SUB 986

REGULATORY CONDITIONS

These Regulatory Conditions set forth commitments made by Duke Energy and Progress Energy, and their public utility subsidiaries, Duke Energy Carolinas, LLC (DEC), and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc. (PEC), as a precondition of approval of the application by Duke Energy and Progress Energy pursuant to G.S. 62-111(a) for authority to engage in their proposed business combination transaction. These Regulatory Conditions, which become effective only upon closing of the Merger, shall apply jointly and severally to Duke Energy and Progress Energy, as well as jointly and severally to DEC and PEC, and shall be interpreted in the manner that most effectively fulfills the Commission's purposes as set forth in the preamble to Section II of these Regulatory Conditions.

SECTION I
DEFINITIONS

For the purposes of these Regulatory Conditions, capitalized terms shall have the meanings set forth below. If a capitalized term is not defined below, it shall have the meaning provided elsewhere in this document or as commonly used in the electric utility industry.

Affiliate: Duke Energy and any business entity of which ten percent (10%) or more is owned or controlled, directly or indirectly, by Duke Energy. For purposes of these Regulatory Conditions, Duke Energy and each business entity so controlled by it are considered to be Affiliates of DEC and PEC, and DEC and PEC are considered to be Affiliates of each other.

Affiliate Contract: Any contract or agreement (a) between and among any of the Affiliates if such contracts are reasonably likely to have an Effect on DEC's or PEC's Rates or Service, or (b) to which both DEC and any Affiliate are parties or PEC and any Affiliate are parties, including contracts with proposed Affiliates. Such contracts and agreements include, but are not limited to, service, operating, interchange, pooling, and wholesale power sales agreements and agreements involving financings and asset transfers and sales.

Catawba Joint Owners: The North Carolina Electric Membership Corporation, North Carolina Municipal Power Agency No. 1, and Piedmont Municipal Power Agency. For purposes of these Regulatory Conditions, DEC is not included in the definition of Catawba Joint Owners.

Code of Conduct: The minimum guidelines and rules approved by the Commission that govern the relationships, activities, and transactions between and among the public utility operations of DEC and PEC, Duke Energy, the other Affiliates of DEC

and PEC, and the Nonpublic Utility Operations of DEC and PEC, as those guidelines and rules may be amended by the Commission from time to time.

Commission: The North Carolina Utilities Commission.

Customer: Any retail electric customer of DEC or PEC in North Carolina.

DEBS: Duke Energy Business Services, LLC, and its successors, which is a service company Affiliate that provides Shared Services to DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations of DEC or PEC, singly or in any combination.

DEC: Duke Energy Carolinas, LLC, the business entity, wholly owned by Duke Energy, that holds the franchise granted by the Commission to provide Electric Services within DEC's North Carolina service territory and that engages in public utility operations, as defined in G.S. 62-3(23), within the State of North Carolina.

Duke Energy: Duke Energy Corporation, which is the current holding company parent of DEC and PEC, and any successor company.

Effect on DEC's or PEC's Rates or Service: When used with reference to the consequences to DEC or PEC of actions or transactions involving an Affiliate or Nonpublic Utility Operation, this phrase has the same meaning that it has when the Commission interprets G.S. 62-3(23)(c) with respect to the affiliation covered therein.

Electric Services: Commission-regulated electric power generation, transmission, distribution, delivery, or sales, and other related services, including, but not limited to, administration of Customer accounts and rate schedules, metering, billing, and standby service.

Federal Law: Any federal statute or legislation, or any regulation, order, decision, rule or requirement promulgated or issued by an agency or department of the federal government.

FERC: The Federal Energy Regulatory Commission.

Fully Distributed Cost: All direct and indirect costs, including overheads and an appropriate cost of capital, incurred in providing goods or services to another business entity; provided, however, that (a) for each good and service supplied by or from DEC or PEC, the return on common equity utilized in determining the appropriate cost of capital shall equal the return on common equity authorized by the Commission in the supplying utility's most recent general rate case proceeding, (b) for each good and service supplied to DEC or PEC, the appropriate cost of capital shall not exceed the overall cost of capital authorized in the supplying utility's most recent general rate case proceeding; and (c) for each good and service supplied by or from DEC and PEC to each other, the return on common equity utilized in

determining the appropriate cost of capital shall not exceed the lower of the returns on common equity authorized by the Commission in DEC's and PEC's most recent general rate case proceedings.

JDA: Joint Dispatch Agreement, which is the agreement as filed with the Commission on April 1, 2011, and as revised and filed on April 4, 2011, in Docket Nos. E-7, Sub 980, and E-2, Sub 995, and allowed by the Commission to be filed with the FERC, by Order dated April 4, 2011, and as further revised and filed on June 22, 2011, and allowed to be filed with the FERC by Order dated July 11, 2011, in Docket Nos. E-7, Sub 986, and E-2, Sub 998.

Market Value: The price at which property, goods, and services would change hands in an arm's length transaction between a buyer and a seller without any compulsion to engage in a transaction, and both having reasonable knowledge of the relevant facts.

Merger: All transactions contemplated by the Agreement and Plan of Merger between Duke Energy and Progress Energy.

Native Load Priority: Power supply service being provided or electricity otherwise being sold with a priority of service equivalent to that planned for and provided by DEC or PEC to their respective Retail Native Load Customers.

Non-Native Load Sales: DEC's or PEC's sales of energy at wholesale, not including transactions between DEC and PEC pursuant to the JDA and not including service to customers served at Native Load Priority.

Nonpublic Utility Operations: All business operations engaged in by DEC or PEC involving activities (including the sales of goods or services) that are not regulated by the Commission, or otherwise subject to public utility regulation at the state or federal level.

Non-Utility Affiliate: Any Affiliate, including DEBS and PESC, other than a Utility Affiliate, DEC, or PEC.

PEC: Progress Energy Carolinas, Inc., the business entity wholly owned by Duke Energy that holds the franchises granted by the Commission to provide Electric Services within the North Carolina service territory of PEC and that engages in public utility operations, as defined in G.S. 62-3(23) within the State of North Carolina.

PESC: Progress Energy Services Company, and its successors, which is a service company Affiliate that provides Shared Services to PEC, DEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations of DEC or PEC, individually or in combination.

Progress Energy: Progress Energy, Inc., which is the former holding company parent of PEC, and which became a subsidiary of Duke Energy after the close of the Merger, and any successors.

Public Staff: The Public Staff of the North Carolina Utilities Commission.

PUHCA 2005: The Public Utility Holding Company Act of 2005.

Purchased Power Resources: Purchases of energy by DEC or PEC at wholesale from sellers other than each other, the contract terms for which are one year or longer.

Retail Native Load Customers: The captive retail Customers of DEC and PEC in North Carolina for which DEC and PEC have the obligation under North Carolina law to engage in long-term planning and to supply all Electric Services, including installing or contracting for capacity, if needed, to reliably meet their electricity needs.

Retained Earnings: The retained earnings currently required to be listed on page 112, line 11, of the pre-Merger DEC FERC Form 1 and the pre-Merger PEC FERC Form 1.

Shared Services: The services that meet the requirements of these Regulatory Conditions and that the Commission has explicitly authorized DEC and PEC to take from DEBS or PESC pursuant to a service agreement (a) filed with the Commission pursuant to G.S. 62-153(b), thus requiring acceptance and authorization by the Commission, and (b) subject to all other applicable provisions of North Carolina law, the rules and orders of the Commission, and these Regulatory Conditions.

Utility Affiliates: The regulated public utility operations of Duke Energy Indiana, Inc. (Duke Indiana), Duke Energy Kentucky, Inc. (Duke Kentucky), and Florida Power Corporation, d/b/a Progress Energy Florida (PEF), and the regulated transmission and distribution operations of Duke Energy Ohio, Inc. (Duke Ohio).

SECTION II
AUTHORITY, SCOPE, AND EFFECT

These Regulatory Conditions are based on the general power and authority granted to the Commission in Chapter 62 of the North Carolina General Statutes to control and supervise the public utilities of the State. The Regulatory Conditions (a) constitute specific exercises of the Commission's authority, (b) provide mechanisms that enable the Commission to determine in advance the extent of its authority and jurisdiction over proposed activities of, and transactions involving, DEC, PEC, Duke Energy, other Affiliates or Nonpublic Utility Operations, and (c) protect the Commission's jurisdiction from federal preemption and its effects. The purpose of these Regulatory Conditions is to ensure that DEC's and PEC's Retail Native Load Customers (a) are protected from any known adverse effects from the Merger, (b) are

protected as much as possible from potential costs and risks resulting from the Merger, and (c) receive sufficient known and expected benefits to offset any potential costs and risks resulting from the Merger. These Regulatory Conditions are not intended to impose legal obligations on entities in which Duke Energy does not directly or indirectly have a controlling voting interest, or to affect any rights of any party to participate in subsequent proceedings.

2.1 Waiver of Certain Federal Rights. Pursuant to these conditions, DEC, PEC, Duke Energy, and other Affiliates waive certain of their federal rights as specified in these Regulatory Conditions, but do not otherwise agree that the Commission has authority other than as provided for in Chapter 62.

2.2 Limited Right to Challenge Commission Orders. Other than as provided for, or explicitly prohibited, in these conditions, Duke Energy, DEC, PEC, and other Affiliates retain the right to challenge the lawfulness of any Commission order issued pursuant to or relating to these Regulatory Conditions on the basis that such order exceeds the Commission's statutory authority under North Carolina law or the other grounds listed in G.S. 62-94(b).

2.3 Waiver Request. DEC, PEC, Duke Energy, and other Affiliates may seek a waiver of any aspect of these Regulatory Conditions by filing a request with the Commission showing that exigent circumstances in a particular case justify such a waiver.

SECTION III
PROTECTION FROM PREEMPTION

The following Regulatory Conditions are intended to protect the jurisdiction of the Commission against the risk of federal preemption as a result of the Merger, including risks related to agreements and transactions between and among DEC, PEC, and any of their Affiliates; financing transactions involving Duke Energy, DEC, or PEC, and any other Affiliate; the ownership, use, and disposition of assets by DEC or PEC; participation in the wholesale market by DEC or PEC; and filings with federal regulatory agencies.

3.1 Transactions between DEC, PEC, and Other Affiliates; Affiliate Contract Provisions; Advance Notice of Affiliate Contracts to Be Filed with the FERC; Annual Certification.

(a) Neither DEC nor PEC shall engage in any transactions with an Affiliate or proposed Affiliate without first filing the proposed Affiliate Contract with the Commission that memorializes any such dealings and taking such actions and obtaining from the Commission such decisions as are required under North Carolina law. DEC and PEC shall submit each proposed Affiliate Contract to the Public Staff for informal review at least ten days before filing it with the Commission. No formal advance

notice is required for agreements that DEC or PEC intends to file pursuant to G.S. 62-153 unless the agreements are to be filed with the FERC, in which case subsection (c) applies.

(b) All Affiliate Contracts to which DEC or PEC is a party shall contain the following provisions:

(i) DEC's or PEC's participation in the agreement is voluntary, DEC or PEC is not obligated to take or provide services or make any purchases or sales pursuant the agreement, and DEC or PEC may elect to discontinue its participation in the agreement at its election after giving any required notice;

(ii) DEC or PEC may not make or incur a charge under the agreement except in accordance with North Carolina law and the rules, regulations and orders of the Commission promulgated thereunder;

(iii) DEC or PEC may not seek to reflect in rates any (A) costs incurred under the agreement exceeding the amount allowed by the Commission or (B) revenue level earned under the agreement less than the amount imputed by the Commission; and

(iv) Neither DEC nor PEC shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of another entity's assertions, that the Commission's authority to assign, allocate, impute, make pro-forma adjustments to, or disallow revenues and costs for retail ratemaking and regulatory accounting and reporting purposes is, in whole or in part, (A) preempted by Federal Law or (B) not within the Commission's power, authority or jurisdiction; DEC and PEC will bear the full risk of any preemptive effects of Federal Law with respect to the agreement.

(c) In order to enable the Commission to exercise its jurisdiction over a proposed Affiliate Contract, a contract with a proposed Affiliate, or an amendment to an existing Affiliate Contract that involves costs that will be assigned to DEC or PEC and that is required or intended to be filed with the FERC, the following procedures shall apply:

(i) DEC or PEC shall file advance notice and a copy of the proposed Affiliate Contract, a contract with a proposed Affiliate, or an amendment to an existing Affiliate Contract with the Commission at least 30 days prior to a filing with the FERC. A copy shall be provided to the Public Staff at the time of the filing. The

provisions of Regulatory Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition.

(ii) If an objection to DEC or PEC proceeding with the filing with the FERC is filed pursuant this Regulatory Condition, the proposed filing shall not be made with the FERC until the Commission issues an order resolving the objection.

(iii) Filings of advance notices and copies of proposed Affiliate Contracts, a contract with a proposed Affiliate, and amendments to existing Affiliate Contracts pursuant to this subsection shall be in addition to filings required by G.S. 62-153, and the burden of proof as to those filings shall be as provided by statute.

(d) Both DEC and PEC shall certify in a filing with the Commission that neither DEC, PEC, Duke Energy, any other Affiliate, nor any Nonpublic Utility Operation has made any filing with the FERC or any other federal regulatory agency inconsistent with the foregoing. Such certification shall be repeated annually on the anniversary of the first certification.

3.2 Financing Transactions Involving DEC, PEC, Duke Energy, or Other Affiliates.

(a) With respect to any financing transaction between DEC or PEC and Duke Energy, or any one or more of DEC's or PEC's other Affiliates, any contract memorializing such transaction shall expressly provide that DEC or PEC shall not enter into any such financing transaction except in accordance with North Carolina law and the rules, regulations and orders of the Commission promulgated thereunder; and

(b) With respect to any financing transaction (i) between and among any of the Affiliates if such contracts are reasonably likely to have an Effect on DEC's or PEC's Rates or Service, or (ii) between DEC and PEC or between DEC or PEC and any other Affiliate, any contract memorializing such transaction shall expressly provide that DEC and/or PEC shall not include the effects of any capital structure or debt or equity costs associated with such financing transaction in its North Carolina retail cost of service or rates except as allowed by the Commission.

3.3 Ownership and Control of Assets Used by DEC and PEC to Supply Electric Power to North Carolina Retail Customers; Transfer of Ownership or Control.

(a) DEC and PEC shall each own and control all assets or portions of assets used for the generation, transmission, and distribution of electric power to their respective North Carolina retail Customers (with the

exception of assets solely used to provide power purchased by DEC or PEC at wholesale).

(b) With respect to the transfer by DEC or PEC to any entity, affiliated or not, of the control of, operational responsibility for, or ownership of such assets with a gross book value in excess of ten million dollars ($10 million), DEC or PEC shall provide written notice to the Commission at least 30 days in advance of the proposed transfer. The provisions of Regulatory Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition.

(c) Any contract memorializing such a transfer shall include the following language:

(i) DEC or PEC may not commit to or carry out the transfer except in accordance with applicable law, and the rules, regulations and orders of the Commission promulgated thereunder; and

(ii) DEC or PEC may not include in its North Carolina retail cost of service or rates the value of the transfer, whether or not subject to federal law, except as allowed by the Commission in accordance with North Carolina law.

(d) Any application filed with the FERC in connection with any transfer of control, operational responsibility, or ownership that involves or potentially affects DEC or PEC shall include the language set forth in subdivisions (c)(i) and (ii), above, and shall request that the FERC explicitly provide in any order approving the application that its approval in no way affects the right of the Commission to review the value of such transfer and to establish the value of the asset transfer for purposes of determining the rates for services rendered to DEC's and PEC's North Carolina retail Customers.

3.4 Purchases and Sales of Electricity between DEC, PEC, Duke Energy, Other Affiliates, or Nonpublic Utility Operations. Subject to additional restrictions set forth in the Code of Conduct, neither DEC nor PEC shall purchase electricity (or related ancillary services) from Duke Energy, another Affiliate, or a Nonpublic Utility Operation under circumstances where the total all-in costs, including generation, transmission, ancillary costs, distribution, taxes and fees, and delivery point costs, incurred (whether directly or through allocation), based on information known, anticipated, or reasonably available at the time of purchase, exceed fair Market Value for comparable service, nor shall DEC or PEC sell electricity (or related ancillary services) to Duke Energy, another Affiliate, or a Nonpublic Utility Operation for less than fair Market Value; provided, however, that such restrictions shall not apply to emergency transactions. This condition shall not apply to transactions between DEC and PEC that are governed by the JDA.

3.5 Least Cost Integrated Resource Planning and Resource Adequacy. DEC and PEC shall each retain the obligation to pursue least cost integrated resource planning for their respective Retail Native Load Customers and remain responsible for their own resource adequacy subject to Commission oversight in accordance with North Carolina law. DEC and PEC shall determine the appropriate self-built or purchased power resources to be used to provide future generating capacity and energy to their respective Retail Native Load Customers, including the siting considered appropriate for such resources, on the basis of the benefits and costs of such siting and resources to those Retail Native Load Customers.

3.6 Priority of Service.

(a) The planning and joint dispatch of DEC's system generation and Purchased Power Resources shall ensure that DEC's Retail Native Load Customers receive the benefits of that generation and those resources, including priority of service, to meet their electricity needs consistent with the JDA. DEC shall continue to serve its Retail Native Load Customers with the lowest-cost power it can reasonably generate or obtain as Purchase Power Resources before making power available for sales to customers that are not entitled to the same level of priority as Retail Native Load Customers.

(b) The planning and joint dispatch of PEC's system generation and Purchase Power Resources shall ensure that PEC's Retail Native Load Customers receive the benefits of that generation and those resources, including priority of service, to meet their electricity needs consistent with the JDA. PEC shall continue to serve its Retail Native Load Customers with the lowest-cost power it can reasonably generate or obtain as Purchase Power Resources before making power available for sales to customers that are not entitled to the same level of priority as Retail Native Load Customers.

3.7 Wholesale Power Contracts Granting Native Load Priority.

(a) DEC is not required to file an advance notice with the Commission or receive its approval prior to entering into wholesale power contracts that grant Native Load Priority to the following historically served customers: the City of Concord, North Carolina; the City of Kings Mountain, North Carolina; the Town of Dallas, North Carolina; the Town of Forest City, North Carolina; Lockhart Power Company; the Public Works Commission of the Town of Due West, South Carolina; the Town of Prosperity, South Carolina; the City of Greenwood, South Carolina; the Town of Highlands; North Carolina; Western Carolina University (WCU); the electric membership cooperatives (EMCs) within DEC's control area; North Carolina Municipal Power Agency No. 1; Piedmont Municipal Power Agency; New River Light & Power Company; and the

South Carolina distribution cooperatives historically served by Saluda River Electric Cooperative, Inc., and currently served by Central Electric Power Cooperative, Inc. (which are Blue Ridge Electric Cooperative, Inc., Broad River Electric Cooperative Inc., Laurens Electric Cooperative, Inc., Little River Electric Cooperative, Inc., and York Electric Cooperative, Inc.). Subject to the conditions set out in Regulatory Condition 3.9, the retail native loads of these historically served wholesale customers shall be considered DEC's Retail Native Load Customers for purposes of Regulatory Conditions 3.5, 3.6, and 4.5; provided, however, that this subsection applies only to the same types of supplemental load and backstand requirements services that were historically provided to the Catawba Joint Owners under the Catawba Interconnection Agreements between DEC and the Catawba Joint Owners prior to 2001, which, for the North Carolina Electric Membership Corporation, only includes the EMCs within DEC's control area.

(b) PEC is not required to file an advance notice with the Commission or receive its approval prior to entering into wholesale power contracts that grant Native Load Priority to the Public Works Commission of the City of Fayetteville, North Carolina; the Town of Waynesville, North Carolina; the City of Camden, South Carolina; the French Broad Electric Membership Corporation; the North Carolina Eastern Municipal Power Agency; the electric membership cooperatives (EMCs) within PEC's control area, whether served through the North Carolina Electric Membership Corporation (NCEMC) or individually; the Town of Black Creek, North Carolina; the Town of Lucama, North Carolina; the Town of Stantonsburg, North Carolina; the Town of Sharpsburg, North Carolina; and the Town of Winterville, North Carolina. Subject to the conditions set out in Regulatory Condition 3.9, the retail native loads of these historically served wholesale customers shall be considered PEC's Retail Native Load Customers for purposes of Regulatory Conditions 3.5, 3.6, and 4.5.

(c) Before either DEC or PEC executes any contract that grants Native Load Priority to a wholesale customer (other than as set forth in subdivisions (a) and (b) above) or to one or more retail customers of another entity, it must provide the Commission with at least 30 days' written advance notice of its intent to grant Native Load Priority and to treat the retail native load of a proposed wholesale customer as if it were DEC's or PEC's retail native load pursuant to Regulatory Conditions 3.5, 3.6, and 4.5. The provisions set forth in Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition.

3.8 Other Wholesale Contracts. To the extent that DEC's or PEC's proposed wholesale power contracts or other sales of energy and capacity are at less than

Native Load Priority, then no advance notice is required and no approval by the Commission is needed.

3.9 Additional Provisions Regarding Wholesale Contracts Entered into by DEC or PEC as Sellers.

(a) The Commission retains the right to assign, allocate, impute, and make pro-forma adjustments with respect to the revenues and costs associated with both DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes.

(b) Entry into wholesale contracts that grant Native Load Priority or otherwise obligate DEC or PEC to construct generating facilities or make commitments to purchase capacity and energy to meet those contractual commitments constitutes acceptance by DEC, PEC, Duke Energy, and other Affiliates or Nonpublic Utility Operations thereof of the risks that investments in generating facilities or commitments to purchase capacity and energy to meet such contractual commitments and maintain an adequate reserve margin throughout the term of such contracts may become uneconomic sunk costs that are not recoverable from DEC's or PEC's respective Retail Native Load Customers. In a future Commission retail proceeding in which cost recovery is at issue, neither DEC nor PEC shall claim that it does not bear this risk, and both DEC and PEC shall acknowledge that the Commission retains full authority under Chapter 62 to disallow such costs as not used and useful and to allocate, impute, or assign such costs away from Retail Native Load Customers. For purposes of this condition, capacity will be considered used and useful and not excess capacity to the extent the Commission determines such capacity is needed by DEC or PEC to meet the expected peak loads of DEC's or PEC's respective Retail Native Load Customers in the near term future plus a reserve margin comparable to that currently being used or otherwise considered appropriate by the Commission. Neither DEC, PEC, Duke Energy, nor any other Affiliate shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of any other entity's assertions that the Commission is preempted from taking the actions contemplated in this subsection.

(c) Neither DEC, PEC, Duke Energy, or other Affiliate shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of any other entity's assertions that (i) transactions entered into pursuant to DEC's or PEC's cost- or market-based rate authority or (ii) the filing with, or acceptance for filing by, the FERC of any wholesale power contract to which either is a party establishes or implies a cost allocation methodology that is binding on

the Commission, requires the pass-through of any costs or revenues under the filed rate doctrine, or preempts the Commission's authority to assign, allocate, impute, make pro-forma adjustments to, or disallow the revenues and costs associated with, DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes.

(d) Neither DEC, PEC, Duke Energy, or other Affiliate shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of any other entity's assertions that the exercise of authority by the Commission to assign, allocate, impute, make pro-forma adjustments to, or disallow the costs and revenues associated with DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes in itself constitutes an undue burden on interstate commerce or otherwise violates the Commerce Clause of the United States Constitution. However, DEC and PEC retain the right to argue that a specific exercise of authority by the Commission violates the Commerce Clause based upon specific evidence of undue interference with interstate commerce.

(e) Except as provided in the foregoing conditions, DEC and PEC retain the right to challenge the lawfulness of any order issued by the Commission in connection with the assignment, allocation, imputation, pro-forma adjustments to, or disallowances of the revenues and costs associated with DEC's or PEC's wholesale contracts for retail ratemaking and regulatory accounting and reporting purposes on any other grounds, including but not limited to the right outlined in G.S. 62-94(b).

3.10 Other Protections.

(a) Neither DEC, PEC, Duke Energy, another Affiliate, nor a Nonpublic Utility Operation shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of any other entity's assertions that approval by the FERC of market-based rates, transfers of generating facilities, or any matter that involves Affiliates in any way preempts the Commission's authority to determine the reasonableness or prudence of DEC's or PEC's decisions with respect to supply-side resources, demand-side management, or any other aspect of resource adequacy.

(b) No agreement shall be entered into, nor shall any filing be made with the FERC, by or on behalf of DEC or PEC, that (i) commits DEC or PEC to, or involves either of them in, joint planning, coordination, dispatch or operation of generation, transmission, or distribution facilities with each

other or with one or more other Affiliates, or (ii) otherwise alters DEC's or PEC's obligations with respect to these Regulatory Conditions, absent explicit approval of the Commission.

(c) DEC, PEC, Duke Energy, the other Affiliates, and the Nonpublic Utility Operations shall file notice with the Commission at least 30 days prior to filing with the FERC any agreement, tariff, or other document or any proposed amendments, modifications, or supplements to any such document that has the potential to (i) affect DEC's or PEC's retail cost of service for system power supply resources or transmission system; (ii) reduce the Commission's jurisdiction with respect to transmission planning or any other aspect of the Commission's planning authority; (iii) be interpreted as involving DEC or PEC in joint planning, coordination, dispatch, or operation of generation or transmission facilities with one or more Affiliates; or (iv) otherwise have an Effect on DEC's or PEC's Rates or Service. The provisions set forth in Regulatory Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition; provided, however, that, to the extent the filing with the FERC is not to be made by DEC or PEC, the advance notice procedures shall be for the purpose of a determination by the Commission as to whether the filing is reasonably likely to have an Effect on DEC's or PEC's Rates or Service.

(d) Any contract or filing regarding DEC's or PEC's membership in or withdrawal from an RTO or comparable entity must be contingent upon state regulatory approval.

(e) Consistent with G.S. 62-153, DEC and PEC shall obtain prior approval of any proposed substantive revisions to any Affiliate agreement to which either of them is a party.

(f) DEC and PEC shall obtain Commission approval before either DEBS or PESC is sold, transferred, merged with any other entities, has any ownership interest therein changed, or otherwise changed so that a change of control could occur. This requirement does not apply to any movement of DEBS or PESC within the Duke Energy holding company system that does not constitute a change of control.

(g) DEC and PEC may participate in joint comments and other joint filings with Affiliates only when such participation fully complies with both the letter and the spirit of the Regulatory Conditions. Any filing made by DEBS or PESC on behalf of DEC or PEC, or in which DEC or PEC participates, must clearly identify DEBS or PESC as an agent of DEC or PEC for purposes of making the filing.

(h) Neither DEC, PEC, Duke Energy, another Affiliate, nor a Nonpublic Utility Operation shall make any assertion or argument either on its own initiative or in support of any other entity's assertions in any forum – whether judicial, administrative, federal, state, or otherwise – with respect to any contract, transaction, or other matter in which DEC or PEC is involved or proposes to be involved or any contract, transaction, or matter involving or proposed to involve Duke Energy, any other Affiliate, or any Nonpublic Utility Operation that may have an Effect on DEC's or PEC's Rates or Service, that the Commission is in any way preempted, in whole or in part, by Federal Law, or is acting beyond the Commission's power, authority or jurisdiction, in exercising its authority under North Carolina law as follows:

(i) reviewing the reasonableness of any Affiliate commitment entered into or proposed to be entered into by DEC or PEC, or disallowing the costs of, or imputing revenues related to such commitment to, DEC or PEC;

(ii) exercising its authority over financings or setting rates based on the capital structure, corporate structure, debt costs, or equity costs that it finds to be appropriate for retail ratemaking purposes;

(iii) reviewing the reasonableness of any commitment entered into or proposed to be entered into by DEC or PEC to transfer an asset;

(iv) mandating, approving, or otherwise regulating a transfer of assets;

(v) scrutinizing and establishing the value of any asset transfers for the purpose of determining the rates for services rendered to DEC's or PEC's Retail Native Load Customers; or

(vi) exercising any other lawful authority it may have.

Should any other entity so assert, neither DEC, PEC, Duke Energy, other Affiliates, nor the Nonpublic Utility Operations shall support any such assertion and shall, promptly upon learning of such assertion, advise and consult with the Commission and the Public Staff regarding such assertion.

(vii) DEC, PEC, Duke Energy, other Affiliates, and the Nonpublic Utility Operations shall (A) bear the full risk of any preemptive effects of Federal Law with respect to any contract, transaction, or commitment entered into or made or proposed to be entered into or made by DEC or PEC or which may otherwise affect

DEC's or PEC's operations, service, or rates and (B) shall take all actions as may be reasonably necessary and appropriate to hold North Carolina ratepayers harmless from rate increases, foregone opportunities for rate decreases or any other adverse effects of such preemption. Such actions include, but are not limited to, filing with and making reasonable efforts to obtain approval from the FERC or other applicable federal entity of such commitments as the Commission deems reasonably necessary to prevent such preemptive effects.

3.11 FERC Filings and Orders. In addition to the filing requirements of Commission Rule R8-27 and all other applicable statutes and rules, DEC and PEC shall, on a quarterly basis, file with the Commission the following: (a) a list of all active dockets at the FERC, including a sufficient description to identify the type of proceeding, in which DEC, PEC, Duke Energy, DEBS, or PESC is a party, with new information in each quarterly filing tracked; and (b) a list of the periodic reports filed by DEC, PEC, Duke Energy, DEBS, or PESC with the FERC, including sufficient information to identify the subject matter of each report and how each report can be accessed. These filings shall be made in Docket Nos. E-7, Sub 986E, and E-2, Sub 998E, as appropriate, and updated regularly. In addition, DEC and PEC shall serve on the Public Staff all filed cost-based and market-based wholesale agreements and amendments; all filings related to their Joint Open Access Transmission Tariff; interconnection agreements and amendments; and any other filings made with the FERC, to the extent these other filings are reasonably likely to have an Effect on DEC's or PEC's Rates or Service.

SECTION IV
JOINT DISPATCH

The following Regulatory Conditions are intended to prevent the jurisdiction and authority of the Commission from being preempted as a result of the JDA, to ensure that DEC's and PEC's Retail Native Load Customers receive adequate benefits from the JDA, and to ensure that both joint dispatch costs and the sharing of cost savings can be appropriately audited.

4.1 Conditional Approval and Notification Requirement. DEC and PEC acknowledge that the Commission's approval of the merger and the transfer of dispatch control from PEC to DEC for purposes of implementing the JDA and any successor document is conditioned upon the JDA or successor document never being interpreted as providing for or requiring: (a) a single integrated electric system, (b) a single BAA, control area or transmission system, (c) joint planning or joint development of generation or transmission, (d) DEC or PEC to construct generation or transmission facilities for the benefit of the other, (e) the transfer of any rights to generation or transmission facilities from DEC or PEC to the other, or (f) any equalization of DEC's and PEC's production costs or rates. If, at any time, DEC, PEC or any other Affiliate learns that any of the foregoing interpretations are being

considered, in whatever forum, they shall promptly notify and consult with the Commission and the Public Staff regarding appropriate action.

4.2 Advance Notice Required. To the extent that DEC and PEC desire to engage in any of items (a) through (f) listed in Regulatory Condition 4.1, above, DEC and PEC shall file advance notice with the Commission at least 30 days prior to taking any action to amend the JDA or a successor document or to enter into a separate agreement. The provisions of Regulatory Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition.

4.3 Function in DEC or PEC. The joint dispatch function, as provided in the JDA or in a successor document, shall be performed by employees of either DEC or PEC.

4.4 No Limitation on Obligations. DEC and PEC acknowledge that nothing in the JDA or any successor document is intended to alter DEC's and PEC's public utility obligations or to provide for joint dispatch in a fashion that is inconsistent with those obligations, including, without limitation, the following: (a) DEC's obligation to plan for and provide least cost electric service to its Retail Native Load Customers and PEC's obligation to plan for and provide least cost electric service to its Retail Native Load Customers; (b) DEC's obligation to serve its Retail Native Load Customers with the lowest cost power it can reasonably generate or purchase from other sources, before making power available for Non-Native Load Sales; and (c) PEC's obligation to serve its Retail Native Load Customers with the lowest cost power it can reasonably generate or purchase from other sources, before making power available for Non-Native Load Sales.

4.5 Protection of Retail Native Load Customers. All joint dispatch and other activities pursuant to the proposed JDA or successor document shall be performed in such a manner as to (a) ensure the reliable fulfillment of DEC's and PEC's respective service obligations to their Retail Native Load Customers, (b) fulfill each utility's obligation to serve its own Retail Native Load Customers with its lowest cost generation; and (c) minimize the total costs incurred by DEC and PEC to fulfill their respective obligations to their Retail Native Load Customers. In no event shall any Non-Native Load Sales be made if, based upon information known, anticipated, or reasonably available at the time a sale is made, any such sale results in higher fuel and fuel-related costs or non-fuel O&M costs, on a replacement cost basis, than would otherwise have been incurred unless the revenues credited from each such sale more than offset the higher costs.

4.6 Treatment of Costs and Savings. DEC's and PEC's respective fuel and fuel-related costs and non-fuel O&M costs, and the treatment of savings for retail ratemaking purposes, shall be calculated as provided in the JDA, unless explicitly changed by order of the Commission.

4.7 Required Records. DEC and PEC shall keep records related to the JDA or any successor document as prescribed by the Commission and in such detail as

may be necessary to enable the Commission and the Public Staff to audit both the actual joint dispatch costs and the sharing of cost savings.

4.8 Auditing of Negative Margins. DEC and PEC also shall keep records that provide such detail as may be necessary to enable the Commission and the Public Staff to audit the circumstances that cause any negative margin on a Non-Native Load Sale or a negative transfer payment made pursuant to Section 7.5(a)(ii) of the JDA.

4.9 Protection of Commission's Authority. Neither DEC, PEC, nor any Affiliate shall assert in any forum – whether judicial, administrative, federal, state, local or otherwise – either on its own initiative or in support of any other entity's assertions that any aspect of the JDA or successor document is intended to diminish or alter the jurisdiction or authority of the Commission over DEC or PEC, including, among other things, the jurisdiction and authority of the Commission to do the following: (a) establish the retail rates on a bundled basis for DEC or PEC, (b) to impose regulatory accounting and reporting requirements, (c) impose service quality standards, (d) require DEC and PEC to engage separately in least cost integrated resource planning, and (e) issue certificates of public convenience and necessity for new generating and transmission resources.

4.10 Preventive Action Required. DEC, PEC, Duke Energy, and other Affiliates shall take all necessary actions to prevent the generating facilities owned or controlled by DEC or PEC from being considered by the FERC to be (a) part, or all, of a power pool, (b) sufficiently integrated to be one integrated system, or (c) otherwise fully subject to the FERC's jurisdiction, as the result of DEC's and PEC's participation in the JDA or any successor document.

4.11 Modification and Termination. DEC and PEC shall modify or terminate the JDA if at any time following consummation of the Merger the Commission finds, after notice and opportunity to be heard, that the JDA does not produce overall cost savings for, or is otherwise not in the best interests of, the North Carolina ratepayers of both DEC and PEC.

SECTION V
TREATMENT OF AFFILIATE COSTS AND RATEMAKING

The following Regulatory Conditions are intended to ensure that the costs incurred by DEC and PEC are properly incurred, accounted for, and directly charged, directly assigned, or allocated to their respective North Carolina retail operations and that only costs that produce benefits for their respective Retail Native Load Customers are included in DEC's and PEC's North Carolina retail cost of service for ratemaking purposes. The procedures set forth in Condition 13.2 do not apply to an advance notice filed pursuant to this section.

5.1 Access to Books and Records. In accordance with North Carolina law, the Commission and the Public Staff shall continue to have access to the books and records of DEC, PEC, Duke Energy Corporation, other Affiliates, and the Nonpublic Utility Operations.

5.2 Procurement or Provision of Goods and Services by DEC or PEC to or from Affiliates or Nonpublic Utility Operations. Except as to transactions between DEC and PEC pursuant to filed and approved service agreements and lists of services, and subject to additional provisions set forth in the Code of Conduct, DEC and PEC shall take the following actions in connection with procuring goods and services for their respective utility operations from Affiliates or Nonpublic Utility Operations and providing goods and services to Affiliates or Nonpublic Utility Operations:

(a) DEC and PEC shall seek out and buy all goods and services from the lowest cost qualified provider of comparable goods and services, and shall have the burden of proving that any and all goods and services procured from their Utility Affiliates, Non-Utility Affiliates, and Nonpublic Utility Operations have been procured on terms and conditions comparable to the most favorable terms and conditions reasonably available in the relevant market, which shall include a showing that comparable goods or services could not have been procured at a lower price from qualified non-Affiliate sources or that neither DEC nor PEC could have provided the services or goods for itself on the same basis at a lower cost. To this end, no less than every four years DEC and PEC shall perform comprehensive, non-solicitation based assessments at a functional level of the market competitiveness of the costs for goods and services they receive from a Utility Affiliate, DEBS, PESC, another Non-Utility Affiliate, and a Nonpublic Utility Operation, including periodic testing of services being provided internally or obtained individually through outside providers. To the extent the Commission approves the procurement or provision of goods and services between and among DEC, PEC, and the Utility Affiliates, those goods and services may be provided at the supplier's Fully Distributed Cost.

(b) To the extent they are allowed to provide such goods and services, DEC and PEC shall have the burden of proving that all goods and services provided by either of them to Duke Energy, a Non-Utility Affiliate, any other Affiliate, or a Nonpublic Utility Operation have been provided on the terms and conditions comparable to the most favorable terms and conditions reasonably available in the market, which shall include a showing that such goods or services have been provided at the higher of cost or market price. To this end, no less than every four years DEC and PEC shall perform comprehensive, non-solicitation based assessments at a functional level of the market competitiveness of the costs for goods and services provided by either of them to a Utility Affiliate, DEBS, PESC,

another Non-Utility Affiliate, any other Affiliate, and a Nonpublic Utility Operation.

(c) The periodic assessments required by subdivisions (a) and (b) of this subsection may take into consideration qualitative as well as quantitative factors. To the extent that comparable goods or services provided to DEC or PEC or by DEC or PEC are not commercially available, this Regulatory Condition shall not apply.

5.3 Location of Core Utility Functions. Core utility functions (i.e., those that are considered public utility operations and support functions) will be part of DEC and PEC, and the employees performing these functions will be DEC and PEC employees and not service company employees of DEBS or PESC. If in the future DEC or PEC desires to move these functions to another entity, Regulatory Condition 13.2 will apply and 30 days' advance notice will be required. The following functions are core utility functions for DEC and PEC:

(a) Outage and Maintenance Services Fuels and System Optimization Power Generation Operations;

(b) Electric Transmission and Distribution Operations, Engineering and Construction; (except for grid modernization functions, which may remain in DEBS);

(c) Project Management and Construction (except for Enterprise Project Management Center of Excellence, Project Development and Initiation, Fossil/Hydro Retrofits, Major Project Services, Commercial and International Major Projects and Performance Improvement, which may remain in DEBS);

(d) Environmental Health and Safety (except for Health and Safety, Environmental Programs and Compliance, EHS Support Systems, **and** Duke Energy International, which may remain in DEBS);

(e) Central Programs and Services for Fossil/Hydro Services (except for Central Programs, Application Support, NERC/CIP, SMEs, Discipline Engineering, CT Services, Lab Services, Environmental Compliance Strategy, and Emerging Technology, which may remain in DEBS);

(f) Customer Operations/Customer Relations;

(g) Rates and Regulatory (except for Rate Design and Analysis and State Support and Research, which may remain in DEBS);

(h) Nuclear Generation (except for Nuclear Development, which may remain in DEBS);

(i) Wholesale Power and Renewable Generation; and

(j) Integrated Resource Planning and Analytics (except for Production Cost Modeling & Data Management, which may remain in DEBS).

Notwithstanding the foregoing, DEC and PEC may file a list of employees at the higher levels of management for their core utility functions that they propose to remain or become DEBS or PESC employees. Within 30 days of this filing, the Public Staff shall file a response and make a recommendation as to how the Commission should proceed. This filing shall be made in Docket No. E-7, Sub 986A, and will not be subject to the provisions of Regulatory Condition 13.2.

5.4 Service Agreements and Lists of Services.

(a) DEC and PEC shall file pursuant to G.S. 62-153 final proposed service agreements that authorize the provision and receipt of non-power goods or services between and among DEC, PEC, their Affiliates or Nonpublic Utility Operations, the list(s) of goods and services that DEC and PEC each intend to take from DEBS and PESC, the list(s) of goods and services DEC and PEC intend to take from each other and the Utility Affiliates, and the basis for the determination of such list(s) and the elections of such services. All such lists that involve payment of fees or other compensation by DEC or PEC shall require acceptance and authorization by the Commission, and shall be subject to any other Commission action required or authorized by North Carolina law and the Rules and orders of the Commission.

(b) DEC and PEC shall take goods and services from an Affiliate only in accordance with the filed service agreements and approved list(s) of services. DEC and PEC shall file notice with the Commission in Docket Nos. E-7, Sub 986A, and E-2, Sub 998A, respectively, at least 15 days prior to making any proposed changes to the service agreements or to the lists of services.

5.5 Charges for and Allocations of the Costs of Affiliate Transactions. To the maximum extent practicable, all costs of Affiliate transactions shall be directly charged. When not practicable, such costs shall be assigned in proportion to the direct charges. If such costs are of a nature that direct charging and direct assignment are not practicable, they shall be allocated in accordance with Commission-approved allocation methods. The following additional provisions shall apply:

(a) DEC and PEC shall keep on file with the Commission cost allocation manuals (CAMs) with respect to goods or services provided by DEC or PEC, any Utility Affiliate, DEBS or PESC, any other Non-Utility Affiliate,

Duke Energy, any other Affiliates, or any Nonpublic Utility Operation to either DEC or PEC.

(b) Each CAM shall describe how all directly charged, direct assignment, and other costs for each provider of goods and services will be charged between and among DEC, PEC, their Utility Affiliates, Non-Utility Affiliates, Duke Energy, any other Affiliates, and the Nonpublic Utility Operations, and shall include a detailed review of the common costs to be allocated and the allocation factors to be used.

(c) The CAM(s) shall be updated annually, and the revised CAM(s) shall be filed with the Commission no later than March 31 of the year that the CAM(s) are to be in effect. DEC and PEC shall review the appropriateness of the allocation bases every two years, and the results of such review shall be filed with the Commission. Interim changes shall be made to the CAM(s), if and when necessary, and shall be filed with the Commission, in accordance with Regulatory Condition 5.6.

(d) No changes shall be made to the procedures for direct charging, direct assigning, or allocating the costs of Affiliate transactions or to the method of accounting for such transactions associated with goods and services (including Shared Services provided by DEBS or PESC) provided to or by Duke Energy, other Affiliates, and the Nonpublic Utility Operations until DEC or PEC has given 15 days' notice to the Commission of the proposed changes, in accordance with Regulatory Condition 5.6.

5.6 Procedures Regarding Interim Changes to the CAMs or Lists of Goods and Services for which 15 Days' Notice Is Required. With respect to interim changes to the CAMs or changes to lists of goods and services, for which the 15 day notice to the Commission is required, the following procedures shall apply: the Public Staff shall file a response and make a recommendation as to how the Commission should proceed before the end of the notice period. If the Commission has not issued an order within 30 days of the end of the notice period, DEC or PEC may proceed with the changes but shall be subject to any fully adjudicated Commission order on the matter. The provisions of Regulatory Condition 13.2 do not apply to advance notices filed pursuant to Regulatory Condition 5.5(c) and (d). Such advance notices shall be filed in Docket Nos. E-7, Sub 986A, and E-2, Sub 998A.

5.7 Annual Reports of Affiliate Transactions. DEC and PEC shall file annual reports of affiliated transactions with the Commission in a format to be prescribed by the Commission in Docket Nos. E-7, Sub 986A, and E-2, Sub 998A. The report shall be filed on or before May 30 of each year, for activity through December 31 of the preceding year. DEC, PEC, and other parties may propose changes to the required affiliated transaction reporting requirements and submit them to the Commission for approval, also in Docket Nos. E-7, Sub 986B, and E-2, Sub 998B.

5.8 Third-party Independent Audits of Affiliate Transactions.

(a) No less often than every two years, a third-party independent audit shall be conducted related to the affiliate transactions undertaken pursuant to Affiliate agreements filed in accordance with Regulatory Condition 5.4 and of DEC's and PEC's compliance with all conditions approved by the Commission concerning Affiliate transactions, including the propriety of the transfer pricing of goods and services between and/or among DEC, PEC, other Affiliates, and all of the Nonpublic Utility Operations.

(i) The first audit following the close of the transaction shall begin two years from the date of close and shall include whether DEC and PEC have adopted systems, policies, CAMs, and other processes to ensure compliance with all of the conditions related to Affiliate dealings and the Code of Conduct and have operated in accordance with those conditions and Code of Conduct.

(ii) The second audit shall begin two years from the date of the Commission's order on the independent auditor's final report on the first audit or, if no such order is issued, two years from the date of such final report. It shall include whether DEC's and PEC's transactions, services, and other Affiliate dealings pursuant to the regulated utility-to-regulated utility service agreement and any other utility to utility agreements are consistent with all of the conditions related to affiliate dealings and the Code of Conduct and whether DEC and PEC have operated in accordance with those conditions and Code of Conduct.

(iii) The third audit shall begin two years from the date of the Commission's order on the independent auditor's final report on the second audit or, if no such order is issued, two years from the date of such final report. It shall include whether DEC's and PEC's transactions, services, and other Affiliate dealings pursuant to the Service Company Utility Service Agreement and other Affiliate transactions other than transactions undertaken pursuant to regulated utility to regulated utility service agreements are consistent with all of the conditions related to affiliate dealings and the Code of Conduct and whether DEC and PEC have operated in accordance with those conditions and Code of Conduct.

(iv) Thereafter, independent audits shall occur every two years from the date of the Commission's order on the immediately preceding auditor's final report or, if no such order is issued, two years from the date of such final report. The subject matter of these audits shall alternate between the subject matters for the second and third independent audits. DEC or PEC may request a change in

the frequency of the audit reports in future years, subject to approval by the Commission.

(b) The following further requirements apply:

(i) The independent auditor shall have sufficient access to the books and records of DEC, PEC, Duke Energy, other Affiliates, and all of the Nonpublic Utility Operations to perform the audits.

(ii) For each audit, the Public Staff shall propose one or more independent auditor(s). DEC, PEC, and other parties shall have an opportunity to comment and propose additional auditors. Selection of the independent auditor shall be made by the Commission. Any party proposing an independent auditor shall file such auditor's audit proposal with the Commission.

(iii) The independent auditor shall be supervised in its duties by the Public Staff, and the auditor's reports shall be filed with the Commission.

5.9 On-Going Review by Commission.

(a) The services rendered by DEC and PEC to their Affiliates and Nonpublic Utility Operations and the services received by DEC or PEC from their Affiliates and Nonpublic Utility Operations pursuant to the filed service agreements, the costs and benefits assigned or allocated in connection with such services, and the determination or calculation of the bases and factors utilized to assign or allocate such costs and benefits, as well as DEC's and PEC's compliance with the Commission-approved Code of Conduct and all Regulatory Conditions, shall remain subject to ongoing review. These agreements shall be subject to any Commission action required or authorized by North Carolina law and the Rules and orders of the Commission.

(b) The service agreements, the CAM(s) and the assignments and allocations of costs pursuant thereto, the biannual allocation factor reviews required by Regulatory Condition 5.4(c), the list(s) and the goods and services provided pursuant thereto, and any changes to these documents shall be subject to ongoing Commission review, and Commission action if appropriate.

5.10 Future Orders. For the purposes of North Carolina retail accounting, reporting, and ratemaking, the Commission may, after appropriate notice and opportunity to be heard, issue future orders relating to DEC's or PEC's cost of service as the Commission may determine are necessary to ensure that DEC's and PEC's operations and transactions with their Affiliates and Nonpublic Utility Operations are consistent with the

Regulatory Conditions and Code of Conduct, and with any other applicable decisions of the Commission.

5.11 Review by the FERC. Notwithstanding any of the provisions contained in these Regulatory Conditions, to the extent the allocations adopted by the Commission when compared to the allocations adopted by the other State commissions with ratemaking authority as to a Utility Affiliate of DEC or PEC result in significant trapped costs related to "non-power goods or administrative or management services provided by an associate company organized specifically for the purpose of providing such goods or services to any public utility in the same holding company system," including DEC and PEC, DEC and PEC may request pursuant to Section 1275(b) of Subtitle F in Title XII of PUHCA 2005 that the FERC "review and authorize the allocation of the costs for such goods and services to the extent relevant to that associate company." Such review and authorization shall have whatever effect it is determined to have under the law. The quoted language in this Condition is taken directly from Section 1275(b) of Subtitle F in Title XII of PUHCA 2005. The terms "associate company" and "holding company system" are defined in Sections 1262(2) and 1262(9), respectively, of Subtitle F in Title XII of PUHCA 2005 and have the same meanings for purposes of this condition.

5.12 Biannual Review of Certain Transactions by Internal Auditors. Transactions between DEC or PEC and Duke Energy, other Affiliates, or the Nonpublic Utility Operations, transactions between DEC and PEC, and other transactions between or among Affiliates if such transactions are reasonably likely to have a significant Effect on DEC's or PEC's Rates or Service, shall be reviewed at least biannually by Duke Energy Corporation's internal auditors. To the extent external audits of the transactions are conducted, DEC and PEC shall make available such audits for review by the Public Staff and the Commission. DEC and PEC also shall make available for review by the Public Staff and the Commission all workpapers relating to internal audits and all other internal audit workpapers, if any, related to affiliate transactions, and shall not oppose Public Staff and Commission requests to review relevant external audit workpapers.

5.13 Notice of Service Company and Non-Utility Affiliates FERC Audits. At such time as either DEC, PEC, Duke Energy, DEBS, or PESC receives notice from the FERC related to an audit of any Affiliate of DEC or PEC, DEC or PEC shall promptly file a notice the Commission that such an audit will be commencing. Any initial report of the FERC's audit team shall be provided to the Public Staff, and any final report shall be filed with the Commission in Docket Nos. E-7, Sub 986E, and E-2, Sub 998E, respectively.

5.14 Acquisition Adjustment. Any acquisition adjustment that results from the Merger shall be excluded from DEC's and PEC's utility accounts and treated for regulatory accounting, reporting, and ratemaking purposes so that it does not affect DEC's or PEC's North Carolina retail electric rates and charges.

5.15 Non-Consummation of Merger. If the merger is not consummated, neither the cost, nor the receipt, of any termination payment between Duke Energy and

Progress Energy shall be allocated to DEC or PEC or recorded on their books. DEC's or PEC's North Carolina retail customers shall not otherwise bear any direct expenses or costs associated with a failed merger.

5.16 Protection from Commitments to Wholesale Customers.

(a) For North Carolina retail electric cost of service/ratemaking purposes, DEC's and PEC's respective electric system costs shall be assigned or allocated between and among retail and wholesale jurisdictions based on reasonable and appropriate cost causation principles. For cost of service/ratemaking purposes, North Carolina retail ratepayers shall be held harmless from any cost assignment or allocation of costs resulting from agreements between DEC and the Catawba Joint Owners, between PEC and the North Carolina Eastern Municipal Power Agency as joint owner, and between either DEC or PEC and any of their wholesale customers.

(b) To the extent commitments to DEC's or PEC's wholesale customers relating to the Merger are made by or imposed upon DEC or PEC, the effects of which (i) decrease the bulk power revenues that are assigned or allocated to DEC's or PEC's North Carolina retail operations or credited to DEC's or PEC's jurisdictional fuel expenses, (ii) increase DEC's or PEC's North Carolina retail cost of service, or (iii) increase DEC's or PEC's North Carolina retail fuel costs under reasonable cost assignment and allocation practices approved or allowed by the Commission, those effects shall not be recognized for North Carolina retail cost of service or ratemaking purposes.

(c) To the extent that commitments are made by or imposed upon DEC, PEC, Duke Energy Corporation, another Affiliate, or a Nonpublic Utility Operation relating to the Merger, either through an offer, a settlement, or as a result of a regulatory order, the effects of which serve to increase the North Carolina retail cost of service or North Carolina retail fuel costs under reasonable cost allocation practices, the effects of these commitments shall not be recognized for North Carolina retail ratemaking purposes.

5.17 Joint Owner-Specific Issues. Assignment or allocation of costs to the North Carolina retail jurisdiction shall not be adversely affected by the manner and amount of recovery of electric system costs from (a) the Catawba Joint Owners as a result of agreements between DEC and the Catawba Joint Owners or (b) the North Carolina Eastern Municipal Power Agency as a result of agreements between it and PEC.

5.18 Inclusion of Cost Savings in Future Rate Proceedings. Neither DEC, PEC, Duke Energy Corporation, any other Affiliate, nor a Nonpublic Utility Operation shall assert that any interested party is prohibited from seeking the inclusion in future rate

proceedings of cost savings that may be realized as a result of any business combination transaction impacting DEC and PEC.

5.19 Reporting of Costs to Achieve. The North Carolina portion of costs to achieve any business combination transaction savings shall be reflected in DEC's and PEC's North Carolina ES-1 report as recorded on its books and records under generally accepted accounting principles. DEC and PEC shall include as a footnote in the ES-1 reports the merger related costs to achieve that were expensed during the relevant period.

5.20 Accounting for Costs to Achieve Related to Historical Events Involving PEC. All costs of PEC's merger with North Carolina Natural Gas Company, the Formation of Progress Energy, and Progress Energy's merger with Florida Progress Corporation shall be excluded from PEC's utility accounts, and all direct or indirect corporate cost increases, if any, attributable to those three events shall be excluded from utility costs for all purposes that affect PEC's regulated retail rates and charges. For purposes of this condition, the term "corporate cost increases" is defined as costs in excess of the level PEC would have (a) incurred using prudent business judgment, or (b) had allocated to it, had these transactions not occurred. "Corporate cost increases" shall also include any payments made under change-of-control agreements, salary continuation agreements, and/or other severance- or personnel-type arrangements that are reasonably attributable to these transactions.

5.21 Liabilities of Cinergy Corp. and Florida Progress Corporation.

(a) DEC's and PEC's Retail Native Load Customers shall be held harmless from all liabilities of Cinergy Corp. and its subsidiaries, including those incurred prior to and after Duke Energy's acquisition of Cinergy Corp. in 2006. These liabilities include, but are not limited to, those associated with the following: (i) manufactured gas plant sites, (ii) asbestos claims, (iii) environmental compliance, (iv) pensions and other employee benefits, (v) decommissioning costs; and (vi) taxes.

(b) DEC's and PEC's Retail Native Load Customers shall be held harmless from all liabilities of Florida Progress Corporation and its subsidiaries, including those incurred prior to and after Progress Energy's acquisition of Florida Progress Corporation in 2000. These liabilities include, but are not limited to, those associated with the following: (i) any outages at and repairs of Crystal River 3, (ii) manufactured gas plant sites, (iii) asbestos claims, (iv) environmental compliance, (v) pensions and other employee benefits, (vi) decommissioning costs, and (vii) taxes.

(c) DEC's Retail Native Load Customers shall be held harmless from all current and prospective liabilities of PEC, and PEC's Retail Native Load Customers shall be held harmless from all current and prospective liabilities of DEC.

5.22 Hold Harmless Commitment. DEC, PEC, Duke Energy, the other Affiliates, and all of the Nonpublic Utility Operations shall take all such actions as may be reasonably necessary and appropriate to hold North Carolina retail ratepayers harmless from the effects of the Merger, including rate increases or foregone opportunities for rate decreases, and other effects otherwise adversely impacting North Carolina retail customers.

5.23 Cost of Service Manuals. Within six months after the closing date of the Merger, DEC and PEC shall each file with the Commission revisions to its electric cost of service manual to reflect any changes to the cost of service determination process made necessary by the Merger, any subsequent alterations in the organizational structure of DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations, or other circumstances that necessitate such changes. These filings shall be made in Docket Nos. E-7, Sub 986A, and E-2, Sub 998A, respectively.

SECTION VI
CODE OF CONDUCT

These Regulatory Conditions include a Code of Conduct in Appendix A. The Code of Conduct governs the relationships, activities and transactions between and among the public utility operations of DEC, PEC, Duke Energy, the Affiliates of DEC and PEC, and the Nonpublic Utility Operations of DEC and PEC.

6.1 Obligation to Comply with Code of Conduct. DEC, PEC, Duke Energy, the other Affiliates, and the Nonpublic Utility Operations shall be bound by the terms of the Code of Conduct set forth in Appendix A and as it may subsequently be amended.

SECTION VII
FINANCINGS

The following Regulatory Conditions are intended to ensure (a) that DEC's and PEC's capital structures and cost of capital are not adversely affected through their affiliation with Duke Energy, each other, and other Affiliates and (b) that both DEC and PEC have sufficient access to equity and debt capital at a reasonable cost to adequately fund and maintain their current and future capital needs and otherwise meet their service obligations to their Customers.

These conditions do not supersede any orders or directives of the Commission regarding specific securities issuances by DEC, PEC, or Duke Energy. The approval of the Merger by the Commission does not restrict the Commission's right to review, and by order to adjust, DEC's or PEC's cost of capital for ratemaking purposes for the effect(s) of the securities-related transactions associated with the Merger.

7.1 Accounting for Equity Investment in Holding Company Subsidiaries. Duke Energy shall maintain its books and records so that any net equity investment in Cinergy Corp. and Progress Energy, their subsidiaries, or their successors, by Duke

Energy or any Affiliates can be identified and made available on an ongoing basis. This information shall be provided to the Public Staff upon its request.

7.2 Accounting for capital structure components and cost rates. Duke Energy , DEC, and PEC shall keep their respective accounting books and records in a manner that will allow all capital structure components and cost rates of the cost of capital to be identified easily and clearly for each entity on a separate basis. This information shall be provided to the Public Staff upon its request.

7.3 Accounting for Equity Investment in DEC and PEC. DEC and PEC shall keep their respective accounting books and records so that the amount of Duke Energy's equity investment in DEC and PEC can be identified and made available upon request on an ongoing basis. This information shall be provided to the Public Staff upon request.

7.4 Reporting of Capital Contributions. As part of their Commission ES-1 Reports, DEC and PEC shall include a schedule of any capital contribution(s) received from Duke Energy in the applicable calendar quarter.

7.5 Identification of Long-term Debt Issued by DEC or PEC. DEC and PEC shall each identify as clearly as possible long-term debt (of more than one year's duration) that they issue in connection with their regulated utility operations and capital requirements or to replace existing debt.

7.6 Procedures Regarding Proposed Financings.

(a) For all types of financings for which DEC or PEC (or their subsidiaries) are the issuers of the respective securities, DEC or PEC (or their subsidiaries) shall request approval from the Commission to the extent required by G.S. 62-160 through G.S. 62-169 and Commission Rule R1-16. Generally, the format of these filings should be consistent with past practices. A "shelf registration" approach (similar to Docket No. E-7, Sub 727) may be requested.

(b) For all types of financings by Duke Energy, other than short-term debt as described in G.S. 62-167, the following shall apply:

(i) On or before January 15 of each year, Duke Energy shall file with the Commission and serve on the Public Staff an advance confidential plan of all securities issuances that it anticipates to occur during that calendar year. The annual confidential plan shall include a description of all financings that Duke Energy reasonably believes may occur during the applicable calendar year. A description for each financing shall include the best estimates of the following: type of security; estimate of cost rate (e.g., interest rate for debt); amount of proceeds; brief description of the

purpose/reason for issue; and amount of proceeds, if any, that may flow to DEC or PEC.

(ii) If at any time material changes to the financing plans included in the filed plan appear likely, Duke Energy shall file a revised 30-day advance confidential plan that specifically addresses such changes with the Commission and serve such notice on the Public Staff.

(iii) At the time of the confidential plan filings identified above, Duke Energy shall also file a non-confidential notice that states that a confidential plan has been filed in compliance with this Regulatory Condition 7.6(b).

(iv) Duke Energy may proceed with equity issuances upon the filing of the confidential plan. However, actual debt issuances shall not occur until 30 days after the advance confidential plan or revised plans are filed. In the event it is not feasible for Duke Energy to file a revised advance confidential plan for a material change 30 days in advance, such plan shall be filed by a date that allows adequate time for review or a debt issuance shall be delayed to allow such review. Prior to the Commission's action on the confidential plan for the year in which the plan is filed, Duke Energy may issue securities authorized under the previous year's plan to the extent such securities were not issued during the previous year.

(v) Within 15 days after the filing of an advance confidential plan or revised plan, the Public Staff shall file a confidential report with the Commission with respect to whether any debt issuances require approval pursuant to G.S. 62-160 through G.S. 62-169 and Commission Rule R1-16 and shall recommend that the Commission issue an order deciding how to proceed. Duke Energy shall have seven days in which to respond to the report. If the Commission determines that any debt issuance requires approval, the Commission shall issue an order requiring the filing of an application and no such issuance shall occur until the Commission approves the application. If the Commission determines that no debt issuance requires approval, the Commission shall issue an order so ruling. At the end of the notice period, Duke Energy may proceed with the debt issuance, but shall be subject to any fully adjudicated Commission order on the matter; provided, however, that nothing herein shall affect the applicability of G.S. 62-170 or other similar provision to such securities or obligations.

(vi) On or before April 15 of each year, Duke Energy shall file with the Commission a report on all financings that were executed for the previous calendar year. The actual reports should include the

same information as required above for the advance plans plus the actual issuance costs.

(c) If a filing with the Securities and Exchange Commission or other federal agency will be made in connection with a securities issuance, the notice shall describe such filing(s) and indicate the approximate date on which it would occur.

(d) Securities issuances or financings that are associated with a merger, acquisition, or other business combination shall be filed in conjunction with the information requirements and deadlines stated in Regulatory Conditions 9.1 and 9.2, and this Condition 7.6 shall not apply to such securities issuances or financings.

7.7 Money Pool Agreement. Subject to the limitations imposed in Regulatory Condition 8.4, DEC and PEC may borrow through Duke Energy's "Utility Money Pool Agreement" (Utility MPA), provided as follows: (a) participation in the Utility MPA is limited to the parties to the Utility MPA dated November 1, 2008, as filed with the Commission on November 17, 2008, in Docket No. E-7, Subs 795A and 810, plus PEC, PEF, Progress Energy, and PESC; and (b) the Utility MPA continues to provide that no loans through the Utility MPA will be made to, and no borrowings through the Utility MPA will be made by, Duke Energy, Progress Energy, and Cinergy Corp. If after December 31, 2011, Duke Ohio's generation assets are no longer dedicated to serving retail load in its service territory and subject to the Electric Security Plan (as approved in Case No. 08-920-EL-SSO, *et al.*), and Duke Ohio continues to be a participant in the Utility MPA, then DEC and PEC shall seek Commission approval within six months of such occurrence, in order to continue participating in the Utility MPA. DEC and PEC shall discontinue such participation within six months after the issuance of a Commission order denying such approval.

7.8 Borrowing Arrangements. Subject to the limitations imposed in Regulatory Condition 8.4, DEC and PEC may borrow short-term funds through one or more joint external debt or credit arrangements (a Credit Facility), provided that the following conditions are met:

(a) No borrowing by DEC or PEC under a Credit Facility shall exceed one year in duration, absent Commission approval;

(b) No Credit Facility shall include, as a borrower, any party other than Duke Energy, DEC, PEC, Duke Indiana, Duke Kentucky, PEF, and, subject to the limitations described in this section, Duke Ohio;

(c) DEC's and PEC's participation in any Credit Facility shall in no way cause either of them to guarantee, assume liability for, or provide collateral for any debt or credit other than its own; and

(d) Duke Ohio may participate in a Credit Facility to the extent the above conditions are met and its generation assets remain dedicated to serving retail load in its service territory and subject to the Electric Security Plan (as approved in Case No. 08-920-EL-SSO, *et al.*), or subject to traditional utility regulation.

If after December 31, 2011, Duke Ohio's generation assets are no longer dedicated to serving retail load in its service territory and subject to the Electric Security Plan (as approved in Case No. 08-920-EL-SSO, *et al.*), then DEC and PEC shall be required to seek Commission approval within six months of such occurrence, in order to continue to participate in a Credit Facility in which Duke Ohio is or will be a participant. DEC and PEC shall discontinue such participation within six months after the issuance of an order by the Commission denying such approval.

7.9 Long-Term Debt Fund Restrictions. DEC and PEC shall acquire their respective long-term debt funds through the financial markets, and shall neither borrow from, nor lend to, on a long-term basis, Duke Energy or any of the other Affiliates. To the extent that either DEC or PEC borrows on short-term or long-term bases in the financial markets and is able to obtain a debt rating, its debt shall be rated under its own name.

SECTION VIII
CORPORATE GOVERNANCE/RING FENCING

The following Regulatory Conditions are intended to ensure the continued viability of DEC and PEC and to insulate and protect DEC, PEC, and their Retail Native Load Customers from the business and financial risks of Duke Energy and the Affiliates within the Duke Energy holding company system, including the protection of utility assets from liabilities of Affiliates.

8.1 Investment Grade Debt Rating. DEC and PEC shall manage their respective businesses so as to maintain an investment grade debt rating on all of their rated debt issuances with all of the debt rating agencies on all of their rated debt issuances. If DEC's or PEC's debt rating falls to the lowest level still considered investment grade at the time, DEC or PEC shall file written notice to the Commission and the Public Staff within five (5) days of such change and an explanation as to why the downgrade occurred. Within 45 days of such notice, DEC or PEC shall provide the Commission and the Public Staff with a specific plan for maintaining and improving its debt rating. The Commission, after notice and hearing, may then take whatever action it deems necessary consistent with North Carolina law to protect the interests of DEC's or PEC's Retail Native Load Customers in the continuation of adequate and reliable service at just and reasonable rates.

8.2 Distributions from DEC and PEC to Holding Company. DEC and PEC shall limit cumulative distributions paid to Duke Energy subsequent to the Merger to (a) the

amount of Retained Earnings on the day prior to the closure of the Merger, plus (b) any future earnings recorded by DEC and PEC subsequent to the Merger.

8.3 Debt Ratio Restrictions. To the extent any of Duke Energy's external debt or credit arrangements contain covenants restricting the ratio of debt to total capitalization on a consolidated basis to a maximum percentage of debt, Duke Energy shall ensure that the capital structures of both DEC and PEC individually meet those restrictions.

8.4 Limitation on Continued Participation in Utility Money Pool Agreement and other Joint Debt and Credit Arrangements with Affiliates. DEC and PEC may continue to participate in the Utility MPA and any other authorized joint debt or credit arrangement as provided in Regulatory Conditions 7.7 and 7.8 only to the extent such participation is beneficial to their respective Retail Native Load Customers and does not negatively affect DEC's or PEC's ability to continue to provide adequate and reliable service at just and reasonable rates.

8.5 Notice of Level of Non-Utility Investment by Holding Company System. In order to enable the Commission to determine whether the cumulative investment by Duke Energy in assets, ventures, or entities other than regulated utilities is reasonably likely to have an Effect on DEC's or PEC's Rates or Service so as to warrant Commission action (pursuant to Regulatory Condition 8.7 or other applicable authority) to protect Retail Native Load Customers, Duke Energy shall notify the Commission within 90 days following the end of any fiscal year for which Duke Energy reports to the Securities and Exchange Commission assets in its operations other than regulated utilities that are in excess of 22% of its consolidated total assets. The following procedures shall apply to such a notice:

(a) Any interested party may file comments within 45 days of the filing of Duke Energy's notice.

(b) If timely comments are filed, the Public Staff shall place the matter on a Commission Staff Conference agenda as soon as possible, but in no event later than 15 days after the comments are filed, and shall make a recommendation as to how the Commission should proceed. If the Commission determines that the percentage of total assets invested in Duke Energy's its operations other than regulated utilities is reasonably likely to have an Effect on DEC's or PEC's Rates or Service so as to warrant action by the Commission to protect DEC's and PEC's Retail Native Load Customers, the Commission shall issue an order setting the matter for further consideration. If the Commission determines that the percentage threshold being exceeded does not warrant action by the Commission, the Commission shall issue an order so ruling.

8.6 Notice by Holding Company of Certain Investments. Duke Energy shall file a notice with the Commission subsequent to Board approval and as soon as practicable following any public announcement of any investment in a regulated utility or a non-

regulated business that represents five (5) percent or more of Duke Energy's book capitalization.

8.7 Ongoing Review of Effect of Holding Company Structure. The operation of DEC and PEC under a holding company structure shall continue to be subject to Commission review. To the extent the Commission has authority under North Carolina law, it may order modifications to the structure or operations of Duke Energy, DEBS, PESC, another Affiliate, or a Nonpublic Utility Operation, and may take whatever action it deems necessary in the interest of Retail Native Load Customers to protect the economic viability of DEC and PEC, including the protection of DEC's and PEC's public utility assets from liabilities of Affiliates.

8.8 Investment by DEC or PEC in Non-regulated Utility Assets and Non-utility Business Ventures. Neither DEC nor PEC shall invest in a non-regulated utility asset or any non-utility business venture exceeding $50 million in purchase price or gross book value to DEC or PEC unless it provides 30 days' advance notice. Regulatory Condition 13.2 shall apply to an advance notice filed pursuant to this Regulatory Condition. Purchases of assets, including land, that will be held with a definite plan for future use in providing Electric Services in DEC's or PEC's franchise area shall be excluded from this advance notice requirement.

8.9 Investment by Holding Company in Exempt Wholesale Generators. By April 15 of each year, Duke Energy shall provide to the Commission and the Public Staff a report summarizing Duke Energy's investment in exempt wholesale generators (EWGs) and foreign utility companies (FUCOs) in relation to its level of consolidated retained earnings and consolidated total capitalization at the end of the preceding year. Exempt wholesale generator and foreign utility company are defined in Section 1262(6) of Subtitle F in Title XII of PUHCA 2005 and have the same meanings for purposes of this condition.

8.10 Notice by DEC or PEC of Default or Bankruptcy of Affiliate. If an Affiliate of DEC or PEC experiences a default on an obligation that is material to Duke Energy or files for bankruptcy, and such bankruptcy is material to Duke Energy, DEC or PEC shall notify the Commission in advance, if possible, or as soon as possible, but not later than ten days from such event.

8.11 Annual Report on Corporate Governance. No later than March 31 of each year, DEC and PEC shall file a report including the following:

(a) A complete, detailed organizational chart (i) identifying DEC, PEC and each Duke Energy financial reporting segment, and (ii) stating the business purpose of each Duke Energy financial reporting segment. Changes from the report for the immediately preceding year shall be summarized at the beginning of the report.

(b) A list of all Duke Energy financial reporting segment that are considered to constitute non-regulated investments and a statement of each segment's total capitalization and the percentage it represents of Duke Energy's non-regulated investments and total investments. Changes from the report for the immediately preceding year shall be summarized at the beginning of the report.

(c) An assessment of the risks that each unregulated Duke Energy financial reporting segment could pose to DEC or PEC based upon current business activities of those affiliates and any contemplated significant changes to those activities

(d) A description of DEC's, PEC's and each Significant Affiliates actual capital structure. In addition, describe Duke Energy's, DEC's and PEC's goals for DEC's and PEC's capital structure and plans for achieving such goals.

(e) A list of all protective measures (other than those provided for by the Regulatory Conditions adopted in Docket Nos. E-7, Sub 986, and E-2, Sub 998) in effect between DEC, PEC, and any of their Affiliates, and a description of the goal of each measure and how it achieves that goal, such as mitigation of DEC's and PEC's exposure in the event of a bankruptcy proceeding involving any Affiliate(s).

(f) A list of corporate executive officers and other key personnel that are shared between DEC, PEC and any Affiliate, along with a description of each person's position(s) with, and duties and responsibilities to each entity.

(g) A calculation of Duke Energy's total book and market capitalization as of December 31 of the preceding year for common equity, preferred stock, and debt.

SECTION IX
FUTURE MERGERS AND ACQUISITIONS

The following Regulatory Conditions are intended to ensure that the Commission receives sufficient notice to exercise its lawful authority over proposed mergers, acquisitions, and other business combinations involving Duke Energy, DEC, PEC, other Affiliates, or the Nonpublic Utility Operations. The advance notice provisions set forth in Regulatory Condition 13.2 do not apply to these conditions.

9.1 Mergers and Acquisitions by or Affecting DEC or PEC. For any proposed merger, acquisition, or other business combination by DEC or PEC or that would have an Effect on DEC's or PEC's Rates or Service, DEC or PEC shall file in a new Sub docket an application for approval pursuant to G S. 62-111(a) at least 180 days

before the proposed closing date for such merger, acquisition, or other business combination.

9.2 Mergers and Acquisitions Believed Not to Have an Effect on DEC's or PEC's Rates or Service. For any proposed merger, acquisition, or other business combination that is believed not to have an Effect on DEC's or PEC's Rates or Service, but which involves Duke Energy, other Affiliates, or the Nonpublic Utility Operations and which has a transaction value exceeding $1.5 billion, the following shall apply:

(a) Advance notification shall be filed with the Commission in a new Sub docket by the merging entities at least 90 days prior to the proposed closing date for such proposed merger, acquisition or other business combination. The advance notification is intended to provide the Commission an opportunity to determine whether the proposed merger, acquisition, or other business combination is reasonably likely to affect DEC or PEC so as to require approval pursuant to G S. 62-111(a). The notification shall contain sufficient information to enable the Commission to make such a determination. If the Commission determines that such approval is required, the 180-day advance filing requirement in subsection (a), above, shall not apply.

(b) Any interested party may file comments within 45 days of the filing of the advance notification.

(c) If timely comments are filed, the Public Staff shall place the matter on a Commission Staff Conference agenda as soon as possible, but in no event later than 15 days after the comments are filed, and shall recommend that the Commission issue an order deciding how to proceed. If the Commission determines that the merger, acquisition, or other business combination requires approval pursuant to G.S. 62-111(a), the Commission shall issue an order requiring the filing of an application, and no closing can occur until and unless the Commission approves the proposed merger, acquisition, or business combination. If the Commission determines that the merger, acquisition, or other business combination does not require approval pursuant to G.S. 62-111(a), the Commission shall issue an order so ruling. At the end of the notice period, if no order has been issued, Duke Energy, any other Affiliate, or the Nonpublic Utility Operation may proceed with the merger, acquisition, or other business combination but shall be subject to any fully-adjudicated Commission order on the matter.

SECTION X
STRUCTURE/ORGANIZATION

The following Regulatory Conditions are intended to ensure that the Commission receives adequate notice of, and opportunity to review and take such lawful action as is necessary and appropriate with respect to, changes to the structure and organization of Duke Energy, DEC, PEC, and other Affiliates, and Nonpublic Utility operations as they may affect North Carolina retail ratepayers.

10.1 Transfer of Services, Functions, Departments, Employees, Rights, Assets, or Liabilities. DEC and PEC shall file notice with the Commission 30 days prior to the initial transfer or any subsequent transfer of any services, functions, departments, employees, rights, obligations, assets, or liabilities from DEC or PEC to DEBS, PESC, Duke Energy, another Affiliate, or a Nonpublic Utility Operation that (a) involves services, functions, departments, employees, rights, obligations, assets, or liabilities other than those of a governance or corporate type nature that traditionally have been provided by a service company or (b) potentially would have a significant effect on DEC's or PEC's public utility operations. The provisions of Regulatory Condition 13.2 apply to an advance notice filed pursuant to this Regulatory Condition.

10.2 Notice and Consultation with Public Staff Regarding Proposed Structural and Organizational Changes. Upon request, DEC and PEC shall meet and consult with, and provide requested relevant data to, the Public Staff, regarding plans for significant changes in DEC's, PEC's or Duke Energy's organization, structure (including RTO developments), and activities; the expected or potential impact of such changes on DEC's or PEC's retail rates, operations and service; and proposals for assuring that such plans do not adversely affect DEC's or PEC's Retail Native Load Customers. To the extent that proposed significant changes are planned for the organization, structure, or activities of an Affiliate or Nonpublic Utility Operation and such proposed changes are likely to have an adverse impact on DEC's or PEC's Customers, then DEC's and PEC's plans and proposals for assuring that those plans do not adversely affect their Customers must be included in these meetings. DEC and PEC shall inform the Public Staff promptly of any such events and changes.

SECTION XI
SERVICE QUALITY

The following Regulatory Conditions are intended to ensure that DEC and PEC continue to implement and further their commitment to providing superior public utility service by meeting recognized service quality indices and implementing the best practices of each other and their Utility Affiliates, to the extent reasonably practicable.

11.1 Overall Service Quality. Upon consummation of the Merger, DEC and PEC each shall continue their commitment to providing superior public utility service and

shall maintain the overall reliability of electric service at levels no less than the overall levels it has achieved in the past decade.

11.2 Best Practices. DEC and PEC shall make every reasonable effort to incorporate each other's best practices into its own practices to the extent practicable.

11.3 Quarterly Reliability Reports. DEC and PEC shall each provide quarterly service reliability reports to the Public Staff on the following measures: System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI). The Public Staff may make such quarterly service reliability reports available to the public upon request.

11.4 Notice of NERC Audit. At such time as either DEC or PEC receive notice that the North American Electric Reliability Corporation and/or the SERC Reliability Corporation will be conducting a non-routine compliance audit with respect to DEC or PEC's compliance with mandatory reliability standards, DEC or PEC shall notify the Public Staff.

11.5 Right-of-Way Maintenance Expenditures. DEC and PEC shall budget and expend sufficient funds to trim and maintain their lower voltage line rights-of-way and their distribution rights-of-way in a manner consistent with their internal right-of-way clearance practices and Commission Rule R8-26. In addition, DEC and PEC shall track annually, on a major category basis, departmental or division budget requests, approved budgets and actual expenditures for right-of-way maintenance.

11.6 Right-of-Way Clearance Practices. DEC and PEC shall each provide a copy of their internal right-of-way clearance practices to the Public Staff, and shall promptly notify the Public Staff of any significant changes or modifications to the practices or maintenance schedules.

11.7 Meetings with Public Staff.

(a) DEC and PEC shall each meet annually with the Public Staff to discuss service quality initiatives and results, including (i) ways to monitor and improve service quality, (ii) right-of-way maintenance practices, budgets, and actual expenditures, and (iii) plans that could have an effect on customer service, such as changes to call center operations.

(b) DEC and PEC shall each meet with the Public Staff at least annually to discuss potential new tariffs, programs, and services that enable its customers to appropriately manage their energy bills based on the varied needs of their customers.

11.8 Customer Access to Service Representatives and Other Services. DEC and PEC shall continue to have knowledgeable and experienced customer service

representatives available 24 hours a day to respond to power outage calls and during normal business hours to handle all types of customer inquiries. DEC and PEC shall also maintain up-to-date and user-friendly online services and automated telephone service 24 hours a day to perform routine customer interactions and to provide general billing and customer information.

11.9 Call Center Operations. DEC and PEC shall each provide quarterly reports to the Public Staff regarding measurements of call center performance, including answer times, and customer satisfaction with call center operations.

11.10 Customer Surveys. DEC and PEC shall continue to survey their customers regarding their satisfaction with public utility service and shall incorporate this information into their processes, programs, and services.

SECTION XII
TAX MATTERS

The following Regulatory Conditions are intended to ensure that DEC's and PEC's North Carolina retail ratepayers do not bear any additional tax costs as a result of the merger and receive an appropriate share of any tax benefits associated with the service company Affiliates.

12.1 Costs under Tax Sharing Agreements. Under any tax sharing agreement, neither DEC nor PEC shall seek to recover from its North Carolina retail ratepayers any tax costs that exceed DEC's or PEC's tax liability calculated as if it were a stand-alone, taxable entity for tax purposes.

12.2 Tax Benefits Associated with Service Companies. The appropriate portion of any income tax benefits associated with DEBS and PESC shall accrue to the North Carolina retail operations of DEC and PEC, respectively, for regulatory accounting, reporting, and ratemaking purposes.

SECTION XIII
PROCEDURES

The following Regulatory Conditions are intended to apply to all filings made pursuant to these Regulatory Conditions unless otherwise expressly provided by, Commission order, rule, or statute.

13.1 Filings that Do Not Involve Advance Notice. Regulatory Condition filings that are not subject to Condition 13.2 shall be made in sub dockets of Docket Nos. E-7, Sub 986, and E-2, Sub 998, as follows:

(a) Filings related to affiliate matters required by Regulatory Conditions 5.4, 5.5, 5.6, 5.7, and 5.23 and the filing permitted by Regulatory Condition 5.3 shall be made by DEC and PEC in Sub 986A and Sub 998A, respectively;

(b) Filings related to financings required by Regulatory Condition 7.6, and the filings required by Regulatory Conditions 8.5, 8.6, 8.9, 8.10 and 8.11 shall be made by DEC and PEC in Sub 986B and Sub 998B, respectively;

(c) Files related to compliance as required by Regulatory Conditions 3.1(d) and 14.4 and filings required by Sections III.A.2(l), III.A.3(e), (f), and (g), III.D.5, and III.D.8 of the Code of Conduct shall be made by DEC and PEC in Sub 986C and Sub 998C;

(d) Filings related to the independent audits required by Regulatory Condition 5.8 shall be made in Sub 986D;

(e) Filings related to orders and filings with the FERC, as required by Regulatory Condition 3.1(d), 3.11 and 5.13 shall be made by DEC and PEC in Sub 986E and Sub 998E, respectively;

13.2 Advance Notice Filings. Advance notices filed pursuant to Regulatory Conditions 3.1(c), 3.3(b), 3.7(c), 3.10(c), 4.2, 5.3, 8.8, and 10.1 shall be assigned a new, separate Sub docket. Such a filing shall state what condition and notice period are involved and whether other regulatory approvals are required and shall be in the format of a pleading, with a caption, a title, allegations of the activities to be undertaken, and a verification. Advance notices may be filed under seal if necessary. The following additional procedures apply:

(a) Advance notices of activities to be undertaken shall not be filed until sufficient details have been decided upon to allow for meaningful discovery as to the proposed activities.

(b) The Chief Clerk shall distribute a copy of advance notice filings to each Commissioner and to appropriate members of the Commission Staff and Public Staff.

(c) DEC or PEC shall serve such advance notices on each party to Docket Nos. E-7, Sub 986, and E-2, Sub 998, that has filed a request to receive them with the Commission within 30 days of the issuance of an order approving the Merger in this docket. These parties may participate in the advance notice proceedings without petitioning to intervene. Other interested persons shall be required to follow the Commission's usual intervention procedures.

(d) To effectuate this Regulatory Condition, DEC or PEC shall serve pertinent information on all parties at the time it serves the advance notice. During the advance notice period, a free exchange of information is encouraged, and parties may request additional relevant information. If DEC or PEC objects to a discovery request, DEC or PEC and the requesting party shall

try to resolve the matter. If the parties are unable to resolve the matter, DEC or PEC may file a motion for a protective order with the Commission.

(e) The Public Staff shall investigate and file a response with the Commission no later than 15 days before the notice period expires. Any other interested party may also file a response within the notice period. DEC or PEC may file a reply to the response(s).

(f) The basis for any objection to the activities to be undertaken shall be stated with specificity. The objection shall allege grounds for a hearing, if such is desired.

(g) If neither the Public Staff nor any other party files an objection to the activities, no Commission order shall be issued, and the Sub docket in which the advance notice was filed may be closed.

(h) If the Public Staff or any other party files a timely objection to the activities to be undertaken by DEC or PEC, the Public Staff shall place the matter on a Commission Staff Conference agenda as soon as possible, but in no event later than two weeks after the objection is filed, and shall recommend that the Commission issue an order deciding how to proceed as to the objection. The Commission reserves the right to extend an advance notice period by order should the Commission need additional time to deliberate or investigate any issue. At the end of the notice period, if no order, whether procedural or substantive, has been issued, DEC, PEC, Duke Energy, any other Affiliate, or the Nonpublic Utility Operation may proceed with the activity to be undertaken, but shall be subject to any fully-adjudicated Commission order on the matter.

(i) If the Commission schedules a hearing on an objection, the party filing the objection shall bear the burden of proof at the hearing.

(j) The precedential effect of advance notice proceedings, like most issues of res judicata, will be decided on a fact-specific basis.

(k) If some other Commission filing or Commission approval is required by statute, notice pursuant to a Regulatory Condition alone does not satisfy the statutory requirement.

(l) DEC, PEC, the Public Staff, or any party may move for a waiver if exigent circumstances in a particular case justify such.

SECTION XIV
COMPLIANCE WITH CONDITIONS AND CODE OF CONDUCT

The following Regulatory Conditions are intended to ensure that Duke Energy, DEC, PEC, and all other Affiliates establish and maintain the structures and processes necessary to fulfill the commitments expressed in all of the Regulatory Conditions and the Code of Conduct in a timely, consistent, and effective manner.

14.1 Ensuring Compliance with Regulatory Conditions and Code of Conduct. Duke Energy, DEC, PEC, and all other Affiliates shall devote sufficient resources into the creation, monitoring, and ongoing improvement of effective internal compliance programs to ensure compliance with all Regulatory Conditions and the DEC/PEC Code of Conduct, and shall take a proactive approach toward correcting any violations and reporting them to the Commission. This effort shall include the implementation of systems and protocols for monitoring, identifying, and correcting possible violations, a management culture that encourages compliance among all personnel, and the tools and training sufficient to enable employees to comply with Commission requirements.

14.2 Designation of Chief Compliance Officer. DEC and PEC shall designate a chief compliance officer who will be responsible for compliance with the Regulatory Conditions and Code of Conduct. This person's name and contact information must be posted on DEC's and PEC's Internet Website.

14.3 Annual Training. DEC and PEC shall provide annual training on the requirements and standards contained within the Regulatory Conditions and Code of Conduct to all of their employees (including service company employees) whose duties in any way may be affected by such requirements and standards. New employees must receive such training within the first 60 days of their employment. Each employee who has taken the training must certify electronically or in writing that s/he has completed the training.

14.4 Report of Violations. If DEC and PEC discover that a violation of their requirements or standards contained within the Regulatory Conditions and Code of Conduct has occurred then DEC and PEC shall file a statement with the Commission in Docket Nos. E-7, Sub 986C, and E-2, Sub 998C, respectively, describing the circumstances leading to that violation of DEC's or PEC's requirements or standards, as contained within the Regulatory Conditions and Code of Conduct, and the mitigating and other steps taken to address the current or any future potential violation.

APPENDIX A

CODE OF CONDUCT
GOVERNING THE RELATIONSHIPS, ACTIVITIES, AND TRANSACTIONS BETWEEN AND AMONG THE PUBLIC UTILITY OPERATIONS OF DEC, THE PUBLIC UTILITY OPERATIONS OF PEC, DUKE ENERGY CORPORATION, OTHER AFFILIATES, AND THE NONPUBLIC UTILITY OPERATIONS OF DEC AND PEC

I. DEFINITIONS

For the purposes of this Code of Conduct, the terms listed below shall have the following definitions:

Affiliate: Duke Energy and any business entity of which ten percent (10%) or more is owned or controlled, directly or indirectly, by Duke Energy. For purposes of this Code of Conduct, Duke Energy and any business entity controlled by it are considered to be Affiliates of each other and DEC and PEC are considered to be Affiliates of each other.

Commission: The North Carolina Utilities Commission.

Confidential Systems Operation Information: Nonpublic information that pertains to Electric Services provided by DEC or PEC, including but not limited to information concerning electric generation, transmission, distribution, or sales.

Customer: Any retail electric customer of DEC or PEC in North Carolina.

Customer Information: Non-public information or data specific to a Customer or a group of Customers, including, but not limited to, electricity consumption, load profile, billing history, or credit history that is or has been obtained or compiled by DEC or PEC in connection with the supplying of Electric Services to that Customer or group of Customers.

DEBS: Duke Energy Business Services, LLC, and its successors, which is a service company Affiliate that provides Shared Services to DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations of DEC or PEC, singly or in any combination.

DEC: Duke Energy Carolinas, LLC, the business entity, wholly owned by Duke Energy, that holds the franchise granted by the Commission to provide Electric Services within DEC's North Carolina service territory that engages in public utility operations, as defined in G.S. 62-3(23), within the State of North Carolina.

Duke Energy: Duke Energy Corporation, which is the current holding company parent of DEC and PEC, and any successor company.

Electric Services: Commission-regulated electric power generation, transmission, distribution, delivery, and sales, and other related services, including, but not limited to, administration of Customer accounts and rate schedules, metering, billing, standby service, backups, and changeovers of service to other suppliers.

Fuel and Purchased Power Supply Services: All fuel for generating electric power and purchased power obtained by DEC or PEC from sources other than DEC or PEC for the purpose of providing Electric Services.

Fully Distributed Cost: All direct and indirect costs, including overheads and an appropriate cost of capital, incurred in providing goods or services to another business entity; provided, however, that (a) for each good and service supplied by DEC or PEC, the return on common equity utilized in determining the appropriate cost of capital shall equal the return on common equity authorized by the Commission in the supplying utility's most recent general rate case proceeding; (b) for each good and service supplied to DEC or PEC, the appropriate cost of capital shall not exceed the overall cost of capital authorized in the supplying utility's most recent general rate case proceeding; and (3) for each good and service supplied by DEC and PEC to each other, the return on common equity utilized in determining the appropriate cost of capital shall not exceed the lower of the returns on common equity authorized by the Commission in DEC's and PEC's most recent general rate case proceedings.

JDA: Joint Dispatch Agreement, which is the agreement as filed with the Commission on April 1, 2011, and as revised and filed on April 4, 2011, in Docket Nos. E-7, Sub 980, and E-2, Sub 995, and allowed by the Commission to be filed with the FERC, by Order dated April 4, 2011, and as further revised and filed on June 22, 2011, and allowed to be filed with the FERC by Order dated July 11, 2011, in Docket Nos. E-7, Sub 986, and E-2, Sub 998.

Market Value: The price at which property, goods, and services would change hands in an arm's length transaction between a buyer and a seller without any compulsion to engage in a transaction, and both having reasonable knowledge of the relevant facts.

Merger: All transactions contemplated by the Agreement and Plan of Merger between Duke Energy and Progress Energy.

Natural Gas Services: Natural gas sales and natural gas transportation, and other related services, including, but not limited to, metering and billing.

Nonpublic Utility Operations: All business operations engaged in by DEC or PEC involving activities (including the sales of goods or services) that are not regulated by

the Commission, or otherwise subject to public utility regulation at the state or federal level.

Non-Utility Affiliate: Any Affiliate, including DEBS and PESC, other than a Utility Affiliate, DEC, or PEC.

PEC: Progress Energy Carolinas, Inc., the business entity, wholly owned by Duke Energy, that holds the franchises granted by the Commission to provide Electric Services within the North Carolina service territory of PEC and that engages in public utility operations, as defined in G.S. 62-3(23), within the State of North Carolina.
Personnel: An employee or other representative of DEC, PEC, Duke Energy, another Affiliate, or a Nonpublic Utility Operation, who is involved in fulfilling the business purpose of that entity.

PESC: Progress Energy Services Company and its successors, which is a service company Affiliate that provides Shared Services to PEC, DEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations of DEC or PEC, individually or in combination.

Progress Energy: Progress Energy, Inc., which is the former holding company parent of PEC, and which became a subsidiary of Duke Energy after the close of the Merger, and any successors.

Public Staff: The Public Staff of the North Carolina Utilities Commission.

Regulatory Conditions: The conditions imposed by the Commission in connection with or related to the Merger.

Shared Services: The services that meet the requirements of the Regulatory Conditions approved in Docket Nos. E-7, Sub 986, and E-2, Sub 998, or subsequent orders of the Commission and that the Commission has explicitly authorized DEC or PEC to take from DEBS or PESC pursuant to a service agreement (a) filed with the Commission pursuant to G.S. 62-153(b), thus requiring acceptance and authorization by the Commission, and (b) subject to all other applicable provisions of North Carolina law, the rules and orders of the Commission, and the Regulatory Conditions.

Utility Affiliates: The regulated public utility operations of Duke Energy Indiana, Inc. (Duke Indiana), Duke Energy Kentucky, Inc. (Duke Kentucky), and Florida Power Corporation d/b/a Progress Energy Florida (PEF); and the regulated transmission and distribution operations of Duke Energy Ohio, Inc. (Duke Ohio).

II. GENERAL

This Code of Conduct establishes the minimum guidelines and rules that apply to the relationships, transactions, and activities involving the public utility operations of DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations of DEC

and PEC, to the extent such relationships, activities, and transactions affect the operations or costs of utility service experienced by the public utility operations of DEC and PEC in their respective service areas. DEC, PEC, and the other Affiliates are bound by this Code of Conduct pursuant to Regulatory Condition 6.1 approved by the Commission in Docket Nos. E-2, Sub 998, and E-7, Sub 986. This Code of Conduct is subject to modification by the Commission as the public interest may require, including, but not limited to, addressing changes in the organizational structure of DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations; changes in the structure of the electric industry; or other changes that warrant modification of this Code.

DEC or PEC may seek a waiver of any aspect of this Code of Conduct by filing a request with the Commission showing that exigent circumstances in a particular case justify such a waiver.

III. STANDARDS OF CONDUCT

A. Independence and Information Sharing

1. Separation - DEC, PEC, Duke Energy, and the other Affiliates shall operate independently of each other and in physically separate locations to the maximum extent practicable. DEC, PEC, Duke Energy, and each of the other Affiliates shall maintain separate books and records. Each of DEC's and PEC's Nonpublic Utility Operations shall maintain separate records from those of DEC's and PEC's public utility operations to ensure appropriate cost allocations and any arm's-length-transaction requirements.

2. Disclosure of Customer Information:

   (a) Upon request, and subject to the restrictions and conditions contained herein, DEC and PEC may provide Customer Information to Duke Energy, another Affiliate, or a Nonpublic Utility Operation under the same terms and conditions that such information is provided to non-Affiliates.

   (b) Except as provided in Section III.A.2.(f) below, Customer Information shall not be disclosed to any person or company, without the Customer's consent, and then only to the extent specified by the Customer. Consent to disclosure of Customer Information to Affiliates or Nonpublic Utility Operations may be obtained by means of written authorization, electronic authorization or recorded verbal authorization upon providing the Customer with the information set forth in Attachment A; provided, however, that DEC and PEC retain such authorization for verification purposes for as long as the authorization remains in effect.

(c) If the Customer allows or directs DEC or PEC to provide Customer Information to Duke Energy, another Affiliate, or a Nonpublic Utility Operation, then DEC or PEC shall ask the Customer if he, she, it would like the Customer Information to be provided to one or more non-Affiliates. If the Customer directs DEC or PEC to provide Customer Information to one or more non-Affiliates, the Customer Information shall be disclosed to all entities designated by the Customer contemporaneously and in the same manner.

(d) Sections III.A.2.(a), 2.(b), and 2.(c) herein shall be permanently posted on DEC's and PEC's website.

(e) No DEC or PEC employee who is transferred to Duke Energy or another Affiliate will be permitted to copy or otherwise compile any Customer Information for use by such entity except pursuant to written permission from the Customer, as reflected by a signed Data Disclosure Authorization. Neither DEC nor PEC shall transfer any employee to Duke Energy or another Affiliate for the purpose of disclosing or providing Customer Information to such entity.

(f) Notwithstanding the prohibitions established by this Section III.A.2, DEC and PEC may disclose Customer Information to DEBS, PESC, any other Affiliate, a Nonpublic Utility Operation or a non-affiliated third party without Customer consent, but only to the extent necessary for the Affiliate, Nonpublic Utility Operation or non-affiliated third party to provide goods or services to DEC or PEC and upon their explicit agreement to protect the confidentiality of such Customer Information. To the extent the Commission approves a list of services to be provided and taken pursuant to one or more utility-to-utility service agreements, then Customer Information may be disclosed pursuant to the foregoing exception to the extent necessary for such services to be performed.

(g) DEC and PEC shall take appropriate steps to store Customer Information in such a manner as to limit access to only those persons permitted to receive it and shall require all persons with access to such information to protect its confidentiality.

(h) DEC and PEC shall establish guidelines for its employees and representatives to follow with regard to complying with this Section III.A.2.

(i) No DEBS or PESC employee may use Customer Information to

market or sell any product or service to DEC's or PEC's customers, except in support of a Commission-approved rate schedule or program or a marketing effort managed and supervised directly by DEC or PEC.

(j) DEBS and PESC employees with access to Customer Information must be prohibited from making any improper indirect use of the data, including directing or encouraging any actions based on the Customer Information by employees of DEBS or PESC that do not have access to such information, or by other employees of Duke Energy or other Affiliates or Nonpublic Utility Operations of the Utilities.

(k) Should any inappropriate disclosure of DEC or PEC Customer Information occur at any time, DEC or PEC is required to promptly file a statement with the Commission in this docket describing the circumstances of the disclosure, the Customer information disclosed, the results of the disclosure, and the mitigating and/or other steps taken to address the disclosure.

3. The disclosure of Confidential Systems Operation Information of DEC and PEC (referred to hereinafter as "Information") shall be governed as follows:

(a) Such Information shall not be disclosed by DEC or PEC to an Affiliate or a Nonpublic Utility Operation unless it is disclosed to all competing non-Affiliates contemporaneously and in the same manner. Disclosure to non-Affiliates is not required when disclosure to Affiliates or Nonpublic Utility Operations meets one of the following exceptions:

(i) The Information is provided to employees of DEC or PEC for the purpose of implementing, and operating pursuant to, the JDA in accordance with the Regulatory Conditions approved in Docket Nos. E-7, Sub 986, and E-2, Sub 998;

(ii) The Information is necessary for the performance of services approved to be performed pursuant to one or more Affiliate utility-to-utility service agreements;

(iii) A state or federal regulatory agency or court having jurisdiction over the disclosure of the Information requires the disclosure;

(iv) The Information is provided to employees of DEBS or PESC pursuant to a service agreement filed with the Commission pursuant to G.S. 62-153;

(v) The Information is provided to employees of DEC's or PEC's Utility Affiliates for the purpose of sharing best practices and otherwise improving the provision of regulated utility service;

(vi) The Information is provided to an Affiliate pursuant to an agreement filed with the Commission pursuant to G.S. 62-153, provided that the agreement specifically describes the types of Information to be disclosed;

(vii) Disclosure is otherwise essential to enable DEC or PEC to provide Electric Services to their Customers; or

(viii) Disclosure of the Information is necessary for compliance with the Sarbanes-Oxley Act of 2002.

(b) Any Information disclosed pursuant to the exceptions in Section III.A.3(a), above, shall be disclosed only to employees that need the information for the purposes covered by those exceptions and in as limited a manner as possible. The employees receiving such Information must be prohibited from acting as conduits to pass the Information to any Affiliate(s) and must have explicitly agreed to protect the confidentiality of such Information.

(c) For disclosures pursuant to exceptions (vii) and (viii) in Section III.A.3(a), above, DEC and PEC shall include in their annual affiliated transaction reports the following information:

(i) The types of Information disclosed and the name(s) of the Affiliate(s) to which it is being, or has been, disclosed;

(ii) The reasons for the disclosure; and

(iii) Whether the disclosure is intended to be a one-time occurrence or an ongoing process.

To the extent a disclosure subject to the reporting requirement is intended to be ongoing, only the initial disclosure and a description of any processes governing subsequent disclosures need to be reported.

(d) DEC, PEC, DEBS, and PESC employees with access to CSOI must be prohibited from making any improper indirect use of the data, including directing or encouraging any actions based on the CSOI by employees that do not have access to such information, or by other employees of Duke Energy or other Affiliates or Nonpublic

Utility Operations of DEC and PEC.

(e) Should the handling or disclosure of Market Information, Transmission Information, or other CSOI by DEBS, PESC, or another Affiliate or Nonpublic Utility Operation, or their respective employees, result in (i) a violation of DEC's or PEC's FERC Statement of Policy and Code of Conduct (FERC Code), 18 CFR 358 - Standards of Conduct for Transmission Providers (Transmission Standards), or any other relevant FERC standards or codes of conduct, (ii) the posting of such data on an OASIS or other Internet website, or (iii) other public disclosure of the data, DEC or PEC shall promptly file a statement with the Commission in Commission in Docket Nos. E-7, Sub 986C, and E-2, Sub 998C, respectively, describing the circumstances leading to such violation, posting, or other this docket describing the circumstances leading to such violation, posting, or other public disclosure, any data required to be posted or otherwise publicly disclosed, and the mitigating and/or other steps taken to address the current or any future potential violation, posting, or other public disclosure.

(f) Should any inappropriate disclosure of CSOI occur at any time, DEC or PEC shall promptly file a statement with the Commission in Docket Nos. E-7, Sub 986C, or E-2, Sub 998C, respectively, describing the circumstances of the disclosure, the CSOI disclosed, the results of the disclosure, and the mitigating and/or other steps taken to address the disclosure.

(g) Unless publicly noticed and generally available, should the FERC Code, the Transmission Standards, or any other relevant FERC standards or codes of conduct be eliminated, amended, superseded, or otherwise replaced, DEC and PEC shall file a letter in Docket Nos. E-7, Sub 986E, and E-2, Sub 998E, with the Commission describing such action within 60 days of the action, along with a copy of any amended or replacement document.

B. Nondiscrimination

1. DEC's and PEC's employees and representatives shall not unduly discriminate against non-Affiliated entities.

2. In responding to requests for Electric Services, neither DEC nor PEC shall provide any preference to Duke Energy, another Affiliate, or a Nonpublic Utility Operation, nor to any customers of such an entity, as compared to non-Affiliates or their customers. Moreover, neither DEC, PEC, Duke Energy, nor any other Affiliates shall represent to any person or entity that Duke Energy, another Affiliate, or a Nonpublic Utility Operation will receive any such preference.

3. DEC and PEC shall apply the provisions of their respective tariffs equally to Duke Energy, the other Affiliates, the Nonpublic Utility Operations, and non-Affiliates.

4. DEC and PEC shall process all similar requests for Electric Services in the same timely manner, whether requested on behalf of Duke Energy, another Affiliate, a Nonpublic Utility Operation, or a non-Affiliated entity.

5. No personnel or representatives of DEC, PEC, Duke Energy, or another Affiliate shall indicate, represent, or otherwise give the appearance to another party that Duke Energy or another Affiliate speaks on behalf of DEC or PEC; provided however, that this prohibition shall not apply to employees of DEBS or PESC providing Shared Services or to employees of another Affiliate to the extent explicitly provided for in an affiliate agreement that has been accepted by the Commission. In addition, no personnel or representatives of a Nonpublic Utility Operation shall indicate, represent, or otherwise give the appearance to another party that they speak on behalf of DEC's or PEC's regulated public utility operations.

6. No personnel or representatives of DEC, PEC, Duke Energy, another Affiliate, or a Nonpublic Utility Operation shall indicate, represent, or otherwise give the appearance to another party that any advantage to that party with regard to Electric Services exists as the result of that party dealing with Duke Energy, another Affiliate, or a Nonpublic Utility Operation, as compared with a non-Affiliate.

7. Neither DEC nor PEC shall condition or otherwise tie the provision or terms of any Electric Services to the purchasing of any goods or services from, or the engagement in business of any kind with, Duke Energy, another Affiliate, or a Nonpublic Utility Operation.

8. When any employee or representative of DEC or PEC receives a request for information from or provides information to a Customer about goods or services available from Duke Energy, another Affiliate, or a Nonpublic Utility Operation, the employee or representative shall advise the Customer that such goods or services may also be available from non-Affiliated suppliers.

9. Disclosure of Customer Information to Duke Energy, another Affiliate, a Nonpublic Utility Operation, or a non-Affiliated entity shall be governed by Section III.A.2 of this Code of Conduct.

C. Marketing

1. The public utility operations of DEC and PEC may engage in joint sales, joint sales calls, joint proposals, or joint advertising (a joint marketing arrangement) with their Utility Affiliates and with their Nonpublic Utility Operations, subject to compliance with other provisions of this Code of Conduct and any conditions or restrictions that the Commission may hereafter establish. Neither DEC nor PEC

shall otherwise engage in such joint activities without making such opportunities available to comparable third parties.

2. Neither Duke Energy nor any of the other Affiliates shall use the names or logos of DEC or PEC in any communications unless a disclaimer is included that states the following:

(a) "[Duke Energy Corporation/Affiliate) is not the same company as [DEC/PEC], and [Duke Energy Corporation/Affiliate) has separate management and separate employees";

(b) "[Duke Energy Corporation/Affiliate] is not regulated by the North Carolina
Utilities Commission or in any way sanctioned by the Commission";

(c) "Purchasers of products or services from [Duke Energy Corporation/Affiliate] will receive no preference or special treatment from [DEC/PEC]"; and

(d) "A customer does not have to buy products or services from [Duke Energy Corporation/Affiliate] in order to continue to receive the same safe and reliable electric service from [DEC/PEC]."

3. Nonpublic Utility Operations may not use the names or logos of DEC or PEC in any communications unless a disclaimer is included that states the following:

(a) "[Nonpublic Utility Operation] is not part of the regulated services offered by [DEC/PEC] and is not in any way sanctioned by the North Carolina Utilities Commission";

(b) "Purchasers of products or services from [Nonpublic Utility Operation] will receive no preference or special treatment from [DEC/PEC]"; and

(c) "A customer does not have to buy products or services from [Nonpublic Utility Operation] in order to continue to receive the same safe and reliable electric service from [DEC/PEC]."

The required disclaimer must be sized and displayed in a way that is commensurate with the name and logo so that the disclaimer is at least the larger of one-half the size of the type that first displays the name and logo or the predominant type used in the communication.

D. Transfers of Goods and Services, Transfer Pricing, and Cost Allocation

1. Cross-subsidies involving DEC or PEC and Duke Energy, other Affiliates, or the Nonpublic Utility Operations are prohibited.

2. All costs incurred by personnel or representatives of DEC or PEC for or on behalf of Duke Energy, other Affiliates, or the Nonpublic Utility Operations shall be charged to the entity responsible for the costs.

3. As a general guideline, with regard to the transfer prices charged for goods and services, including the use or transfer of personnel, exchanged between and among DEC or PEC, and Duke Energy, the other Non-Utility Affiliates, and the Nonpublic Utility Operations, to the extent such prices affect DEC's or PEC's operations or costs of utility service, the following conditions shall apply:

(a) Except as otherwise provided for in this Section III.D, for untariffed goods and services provided by DEC or PEC to Duke Energy, a Non-Utility Affiliate, or a Nonpublic Utility Operation, the transfer price paid to DEC or PEC shall be set at the higher of Market Value or DEC's or PEC's Fully Distributed Cost.

(b) Except as otherwise provided for in this Section III.D, for goods and services provided, directly or indirectly, by Duke Energy, a Non-Utility Affiliate other than DEBS or PESC, or a Nonpublic Utility Operation to DEC or PEC, the transfer price(s) charged by Duke Energy, the non-utility Affiliate, and the Nonpublic Utility Operation to DEC or PEC shall be set at the lower of Market Value or Duke Energy's, the Non-Utility Affiliate's, or the Nonpublic Utility Operation's Fully Distributed Cost(s). If DEC or PEC do not engage in competitive solicitation and instead obtain the goods or services from Duke Energy, a non-utility Affiliate, or a Nonpublic Utility Operation, DEC and PEC shall implement adequate processes to comply with this Code provision and related Regulatory Conditions and ensure that in each case DEC's and PEC's Customers receive service at the lowest reasonable cost. For goods and services provided by DEBS and PESC to DEC, PEC, and Utility Affiliates, the transfer price charged shall be set at DEBS' and PESC's Fully Distributed Cost.

(c) Tariffed goods and services provided by DEC and PEC to Duke Energy, other Affiliates, or a Nonpublic Utility Operation shall be provided at the same prices and terms that are made available to Customers having similar characteristics with regard to Electric Services (such as time of use, manner of use, customer class, load factor, and relevant Standard Industrial Classification) under the applicable tariff.

(d) Subject to and in compliance with all conditions placed upon DEC and PEC by the Commission, untariffed non-power, non-generation, or non-fuel goods and services provided by DEC or PEC to DEC, PEC, or the Utility Affiliates or by the Utility Affiliates to DEC or PEC, shall be transferred at the supplier's Fully Distributed Cost.

4. To the extent that DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations receive Shared Services from DEBS or PESC (or their successors), these Shared Services may be jointly provided to DEC, PEC, Duke Energy, other Affiliates, or the Nonpublic Utility Operations on a fully distributed cost basis, provided that the taking of such Shared Services by DEC and PEC is cost beneficial on a service-by-service (e.g., accounting management, human resources management, legal services, tax administration, public affairs) basis to DEC and PEC. Charges for such Shared Services shall be allocated in accordance with the cost allocation manual(s) filed with the Commission pursuant to Regulatory Condition 5.5, subject to any revisions or other adjustments that may be found appropriate by the Commission on an ongoing basis.

5. DEC, PEC, and their Utility Affiliates may capture economies-of-scale in joint purchases of goods and services (excluding the purchase of natural gas, coal, and electricity or ancillary services intended for resale), if such joint purchases result in cost savings to DEC's and PEC's Customers. DEC, PEC, Duke Indiana, Duke Kentucky, and PEF, may capture economies-of-scale in joint purchases of coal and natural gas, if such joint purchases result in cost savings to DEC's and PEC's Customers. Notwithstanding the foregoing, if any of the coal or natural gas jointly purchased by DEC, PEC, Duke Indiana, Duke Kentucky, or PEF is transferred to or utilized by another Affiliate within 12 months of the joint purchase, DEC and PEC will file a notification of such with the Commission. All joint purchases entered into pursuant to this section shall be priced in a manner that permits clear identification of each participant's portion of the purchases and shall be reported in DEC's and PEC's affiliated transaction reports filed with the Commission.

6. All permitted transactions between DEC, PEC, Duke Energy, other Affiliates, and the Nonpublic Utility Operations shall be recorded and accounted for in accordance with the cost allocation manuals required to be filed with the Commission pursuant to Regulatory Condition 5.5 and with Affiliate agreements accepted by the Commission or otherwise processed in accordance with North Carolina law, the rules and orders of the Commission, and the Regulatory Conditions.

7. Costs that DEC and PEC incur in assembling, compiling, preparing, or furnishing requested Customer Information or Confidential Systems Operation Information for or to Duke Energy, other Affiliates, Nonpublic Utility Operations, or non-Affiliates shall be recovered from the requesting party pursuant to Section III.D.3 of this Code of Conduct.

8. Any technology or trade secrets developed, obtained, or held by DEC or PEC in the conduct of regulated operations shall not be transferred to Duke Energy, another Affiliate, or a Nonpublic Utility Operation without just compensation and the filing of 60-days prior notification to the Commission; provided however, that DEC and PEC are not required to provide advance notice for such transfers to each other. DEC and PEC may request a waiver of this requirement from the Commission with respect to such transfers to Duke Energy, a Utility Affiliate, a Non-Utility Affiliate, or a Nonpublic Utility Operation. In no case, however, shall the notice period requested be less than 20 business days.

9. DEC and PEC shall receive compensation from Duke Energy, other Affiliates, and the Nonpublic Utility Operations for intangible benefits, if appropriate.

E. Regulatory Oversight

1. The State's existing requirements regarding affiliate transactions, as set forth in G.S. 62-153, shall continue to apply to all transactions between DEC, PEC, Duke Energy, and the other Affiliates.

2. The books and records of DEC, PEC, Duke Energy, other Affiliates, and the Nonpublic Utility Operations shall be open for examination by the Commission, its staff, and the Public Staff as provided in G.S. 62-34, 62-37, and 62-51.

3. To the extent North Carolina law, the orders and rules of the Commission, and the Regulatory Conditions permit Duke Energy, an Affiliate, or a Nonpublic Utility Operation to supply DEC or PEC with Natural Gas Services or other Fuel and Purchased Power Supply Services used by DEC or PEC to provide Electric Services to Customers, and to the extent such Natural Gas Services or other Fuel and Purchased Power Supply Services are supplied, DEC or PEC shall demonstrate in its annual fuel adjustment clause proceeding that each such acquisition was prudent and the price was reasonable.

F. Utility Billing Format

To the extent any bill issued by DEC and PEC, Duke Energy, another Affiliate, a Nonpublic Utility Operation, or a non-Affiliated third party includes any charges to Customers for Electric Services and non-Electric Services from Duke Energy, another Affiliate, a Nonpublic Utility Operation, or a non-Affiliated third party, the charges for the Electric Services shall be separated from the charges for any other services included on the bill. Each such bill shall contain language stating that the Customer's Electric Services will not be terminated for failure to pay for any other services billed.

G. Complaint Procedure

1. DEC and PEC shall establish complaint procedures to resolve potential complaints that arise due to the relationship of DEC and PEC with Duke Energy, its other Affiliates, and its Nonpublic Utility Operations. The complaint procedures shall provide for the following:

(a) Verbal and written complaints shall be referred to a designated representative of DEC or PEC.

(b) The designated representative shall provide written notification to the complainant within 15 days that the complaint has been received.

(c) DEC or PEC shall investigate the complaint and communicate the results or status of the investigation to the complainant within 60 days of receiving the complaint.

(d) DEC and PEC shall each maintain a log of complaints and related records and permit inspection of documents (other than those protected by the attorney/client privilege) by the Commission, its staff, or the Public Staff.

2. Notwithstanding the provisions of Section III.G.1, any complaints received through Duke Energy's EthicsLine (or successor), which is a confidential mechanism available to the employees of the Duke Energy holding company system, shall be handled in accordance with procedures established for EthicsLine.

3. These complaint procedures do not affect a complainant's right to file a formal complaint or otherwise address questions to the Commission.

CODE OF CONDUCT
ATTACHMENT A

DEC/PEC CUSTOMER INFORMATION DISCLOSURE AUTHORIZATION

For Disclosure to Affiliates:

DEC's/PEC's Affiliates offer products and services that are separate from the regulated services provided by DEC/PEC. These services are not regulated by the North Carolina Utilities Commission or the Public Service Commission of South Carolina. These products and services may be available from other competitive sources.

The Customer authorizes DEC/PEC to provide any data associated with the Customer account(s) residing in any DEC/PEC files, systems or databases **[or specify specific types of data]** to the following Affiliate(s) _____. DEC/PEC will provide this data on a non-discriminatory basis to any other person or entity upon the Customer's authorization.

For Disclosure to Nonpublic Utility Operations:

DEC/PEC offers optional, market-based products and services that are separate from the regulated services provided by DEC/PEC. These services are not regulated by the North Carolina Utilities Commission or the Public Service Commission of South Carolina. These products and services may be available from other competitive sources.

The Customer authorizes DEC/PEC to use any data associated with the Customer account(s) residing in any DEC/PEC files, systems or databases **[or specify types of data]** for the purpose of offering and providing energy-related products or services to the Customer. DEC/PEC will provide this data on a non-discriminatory basis to any other person or entity upon the Customer's authorization.

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N.C Utilities Commission

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 998
DOCKET NO. E-7, SUB 986

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Application of Duke Energy Corporation and	)	PROPOSED
Progress Energy, Inc., to Engage in a Business	)	REVISION TO
Combination Transaction and to Address	)	REGULATORY
Regulatory Conditions and Code of Conduct	)	CONDITION 4.4

NOW COMES THE PUBLIC STAFF-North Carolina Utilities Commission, and provides a revised Regulatory Condition 4.4 pursuant to the request of the Public Works Commission of the City of Fayetteville, North Carolina (Fayetteville).

1. Regulatory Condition 3.7(b) provides that, subject to the conditions set out in Regulatory Condition 3.9, the retail native loads of the historically served wholesale customers listed in Regulatory Condition 3.7(b) shall be considered Retail Native Load Customers of Progress Energy Carolinas, Inc. (PEC), for purposes of Regulatory Conditions 3.5, 3.6, and 4.5.

2. Fayetteville questioned why Regulatory Condition 3.7(b) did not reference Regulatory Condition 4.4 (as it did Regulatory Conditions 3.5, 3.6, and 4.5) or, alternatively, Regulatory Condition 4.4 did not specifically reference North Carolina law as being the source of the public utility obligation to which PEC and DEC were subject.

3. Duke Energy Corporation, Progress Energy, Inc., Duke Energy Carolinas, LLC, and PEC (collectively the Applicants), and the Public Staff intended that Regulatory Condition 4.4 ensure that the Joint Dispatch Agreement (JDA) and any successor documents would not alter the obligations of PEC and DEC to their respective retail customers under North Carolina law. The Applicants and the Public Staff, therefore, are willing to revise the corrected Regulatory Conditions as filed on September 15, 2011, as set out below, and, accordingly, request that the Regulatory Conditions as admitted into evidence as part of the stipulation among and between the Applicants and the Public Staff also be revised as set out below.

> No Limitation on Obligations. DEC and PEC acknowledge that nothing in the JDA or any successor document is intended to alter DEC's and PEC's public utility obligations **under North Carolina law** or to provide for joint dispatch in a fashion that is inconsistent with those obligations, including, without limitation, the following: (a) DEC's obligation to plan for and provide least

cost electric service to its Retail Native Load Customers and PEC's obligation to plan for and provide least cost electric service to its Retail Native Load Customers; (b) DEC's obligation to serve its Retail Native Load Customers with the lowest cost power it can reasonably generate or purchase from other sources, before making power available for Non-Native Load Sales; and (c) PEC's obligation to serve its Retail Native Load Customers with the lowest cost power it can reasonably generate or purchase from other sources, before making power available for Non-Native Load Sales.

WHEREFORE, the Public Staff respectfully requests that the Commission accept this revision to the stipulated Regulatory Conditions and that the stipulated Regulatory Conditions that are to be admitted into evidence as part of the stipulation among and between the Applicants and the Public Staff be revised accordingly.

Respectfully submitted this the 19th day of September, 2011.

PUBLIC STAFF
Robert P. Gruber
Executive Director

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing upon each of the parties of record in this proceeding or their attorneys of record by causing a copy of the same to be properly addressed to each and sent by email or deposited in the United States Mail, postage prepaid.

This the 19th day of September, 2011.

Gisele L. Rankin

Gisele L. Rankin

Exhibit 2

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-7, SUB 858

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Ruling	)))))	ORDER ON ADVANCE NOTICE AND JOINT PETITION FOR DECLARATORY RULING

HEARD: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on November 5-6, 2008

BEFORE: Chairman Edward S. Finley, Jr., Presiding; Commissioners Lorinzo L. Joyner; Howard N. Lee; and William T. Culpepper, III

APPEARANCES:

For Duke Energy Carolinas, LLC:

Lawrence B. Somers, Associate General Counsel, Duke Energy Corporation, 526 S. Church Street, Charlotte, NC 28202

Robert W. Kaylor, Law Office of Robert W. Kaylor, P.A., 3700 Glenwood Avenue, Suite 330, Raleigh, NC 27612

Kiran H. Mehta, K&L Gates, LLP, 214 North Tryon Street, 47th Floor, Charlotte, NC 28202

For the City of Orangeburg, South Carolina:

James N. Horwood, J.S. Gebhart, Spiegel & McDiarmid, LLP, 1333 New Hampshire Ave., N.W., Washington, DC 20036

Thomas J. Bolch, 7816 Madison Park Lane, Raleigh, NC 27615

For the Using and Consuming Public:

Gisele Rankin, Staff Attorney, Public Staff, 4326 Mail Service Center, Raleigh, NC 27699

Leonard G. Green, Assistant Attorney General, Department of Justice, P.O. Box 629, Raleigh, NC 27602

For the North Carolina Waste Awareness & Reduction Network:

John Runkle, P.O. Box 3793, Chapel Hill, NC 27515

For the Carolina Industrial Group for Fair Utility Rates III:

Ralph McDonald, Bailey & Dixon, LLP, P.O. Box 1351, Raleigh, NC 27602

For Greenwood Commissioners of Public Works:

Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 1600 Wachovia Capitol Center, 150 Fayetteville St., Raleigh, NC 27601

Glen L. Ortman, Stinson, Morrison Hecker, LLP, 1150 18th Street, N.W., Suite 800, Washington, DC 20036

For the City of Fayetteville Public Works Commission:

James P. West, West Law Offices, P.C., Two Hannover Square, Suite 2325, Raleigh, NC 27601

For Wal-Mart Stores East, LP:

Rick D. Chamberlain, Behrens, Taylor, Wheeler & Chamberlain, Six Northeast 63rd Street, Suite 400, Oklahoma City, OK 73105

For Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.:

Len S. Anthony, General Counsel, P.O. Box 1551, PEB 17A4, Raleigh, NC 27602

Jo Anne Sanford, Sanford Law Office, 530 North Person Street, Raleigh, NC 27611

Dwight Allen, The Allen Law Office, PLLC, 3737 Glenwood Avenue, Suite 100, Raleigh, NC 27612

BY THE COMMISSION: On June 20, 2008, Duke Energy Carolinas, LLC (Duke or Company) filed an Advance Notice in the present docket, acting pursuant to Regulatory Condition No. 7(b) of the March 24, 2006 Order Approving Merger Subject to Regulatory Conditions and Code of Conduct in Docket No. E-7, Sub 795 (the Merger

Order). Duke gave notice of its intent to grant native load priority[1] to the City of Orangeburg, South Carolina (Orangeburg) pursuant to a wholesale purchase power agreement dated May 23, 2008, "and to treat the retail native load of Orangeburg as if it is the Company's native load under Regulatory Condition Nos. 5 and 6."

At the same time, Duke and Orangeburg filed a Joint Petition for Declaratory Ruling pursuant to G.S. 1-253 and 62-60. The Joint Petition seeks a declaratory ruling that Duke's new wholesale contracts with native load priority will be treated for ratemaking and reporting purposes "in the same manner as existing wholesale contracts with native load priority," specifically, that revenues from such contracts will be allocated to wholesale jurisdiction and that the allocation of costs associated with such contracts to wholesale jurisdiction will be based on average system costs. Duke has since requested that the declaratory ruling apply to all utilities under the Commission's jurisdiction and, in their proposed order, Duke and Orangeburg have further refined their request as follows: "For all native load priority wholesale contracts entered into subsequent to March 24, 2006, with terms of five years or more for customers located in North Carolina or South Carolina and priced at system average costs, the Commission shall allocate revenues from such contracts to wholesale jurisdiction and the allocation of wholesale costs to wholesale jurisdiction with respect to such contracts will be based on system average, or embedded, costs."

On July 7, 2008, the Public Staff filed an Objection to Duke's Advance Notice. In accordance with Regulatory Condition No. 59, the Public Staff presented the matter at the Commission Staff Conference of July 14, 2008, and recommended that the Commission extend the advance notice period, request written comments on the issues raised by the two filings, and schedule an oral argument. Subsequently, before the Commission had acted on that recommendation, on July 16, 2008, the Public Staff filed a motion recommending instead that both an oral argument and evidentiary hearing be scheduled with the argument on legal and policy issues to be held at the beginning of the hearing. The Public Staff stated that Duke and Orangeburg agreed to the new procedural schedule recommended by the Public Staff.

On July 21, 2008, the Commission issued an order which extended the advance notice period "until further order of the Commission," established a procedural schedule for the prefiling of testimony and statements of legal and policy positions, and scheduled the oral argument and hearing.

The interventions of the Public Staff, the Attorney General, Carolina Utility Customers Association, Inc. (CUCA), and Carolina Industrial Group for Fair Utility Rates (CIGFUR) were recognized pursuant to Regulatory Condition No. 59(b)(iii) of the Merger Order. Petitions to intervene were filed and granted as to North Carolina Waste Awareness & Reduction Network (NC WARN), the Public Works Commission of the City of Fayetteville (Fayetteville), Wal-Mart Stores East, L.P. (Wal-Mart), Greenwood

[1] Native load priority is defined by Condition No. 7(c) of the Merger Order as power supply provided "with a priority of service equivalent to that planned for and provided by Duke Power to its Retail Native Load Customers."

Commissioners of Public Works (Greenwood), Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (Progress or PEC), and North Carolina Electric Membership Corporation (NCEMC). A joint petition to intervene out of time filed by Haywood Electric Membership Corporation (Haywood EMC), Piedmont Electric Membership Corporation (Piedmont EMC), Blue Ridge Electric Membership Corporation (Blue Ridge EMC), and Rutherford Electric Membership Corporation (Rutherford EMC) was granted after the evidentiary hearing.

On August 15, 2008, the Company filed its statement of legal and policy positions and pre-filed the testimony and exhibits of Ellen T. Ruff, President of Duke Energy Carolinas; Judah Rose, Managing Director of ICF International; Mark A. Svrcek, Vice President of Business Development and Origination for Duke Energy Corporation; Janice D. Hager, Managing Director of Integrated Resource Planning and Environmental Strategy for Duke Energy Corporation; and Carol E. Shrum, Vice President, Rates for Duke Energy Carolinas. On the same day, Orangeburg pre-filed the testimony of Fred H. Boatwright, Manager of the Orangeburg Department of Public Utilities, and filed its statement of positions.

The Commission issued an order on August 29, 2008, rescheduling the oral argument and evidentiary hearing for November 5, 2008.

On September 25, 2008, NC WARN filed its comments opposing the Orangeburg Agreement and the petition for a declaratory ruling. On October 20, 2008, the following filings were made by intervenors: the pre-filed direct testimony and exhibits of Michael C. Maness on behalf of the Public Staff and the Public Staff's statement of positions, the pre-filed direct testimony of Sheree L. Brown on behalf of Greenwood and Greenwood's statement, CIGFUR's statement, PEC's position statement, the Attorney General's statement, the comments of Wal-Mart, and the comments of Fayetteville.

On October 31, 2008, the Company filed the rebuttal testimony of witnesses Hager and Shrum, along with a Reply Regarding Legal and Policy Statement. On the same date, Orangeburg filed its Rebuttal Statement of Position.

The case came on for oral argument and hearing as ordered on November 5, 2008. Arguments were heard, and the witnesses who prefiled testimony presented their testimony and were cross-examined.

Following the hearing, on November 13, 2008, Duke filed its Late-Filed Exhibit No. 1, providing information requested by the Attorney General. The Public Staff filed its Late-Filed Exhibit No. 1 on November 25, 2008, as requested by Duke. Finally, Duke filed its Revised Late-Filed Exhibit No. 1 and Confidential Revised Shrum Exhibit 1 on December 4, 2008.

Based upon the pleadings, testimony and exhibits received into evidence and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

1. Duke is a North Carolina public utility with an obligation to provide electric service to retail customers in its franchised service area in North Carolina, subject to the jurisdiction of this Commission. Historically, Duke has also provided electric service to certain wholesale customers within its control area.

2. Orangeburg is a municipality located in the State of South Carolina which serves approximately 25,000 residential, industrial, and commercial electric customers through its Department of Public Utilities. Orangeburg owns generation resources with generation capacity of 23.5 MW. Orangeburg's 2009 peak load is expected to be 190 MW, and its load is expected to grow at approximately 1% per year over the next ten years.

3. Orangeburg is located in the balancing authority area, or control area, of South Carolina Electric & Gas Company (SCE&G) and has been a wholesale customer of SCE&G and its predecessor companies since approximately 1919. In 2005, in anticipation of the expiration of its existing contract with SCE&G, Orangeburg informally sought power supply proposals from other companies. Only Duke and SCE&G submitted proposals, and Orangeburg decided to pursue the Duke proposal. SCE&G's proposal was not based upon its system average costs.

4. Duke and Orangeburg negotiated a Power Purchase Agreement (Agreement or sometimes PPA), and they signed the Agreement on May 23, 2008. Duke negotiated this Agreement acting pursuant to its market-based tariff on file with FERC. The Agreement itself has not been filed with the Federal Energy Regulatory Commission (FERC) and such filing is not required.

5. Pursuant to the Agreement, delivery of electricity to Orangeburg is to begin on May 1, 2009, and Duke will provide Orangeburg's full load requirements for the contract term of May 1, 2009, through December 31, 2018.[2] The Agreement provides for Duke to supply electricity to Orangeburg in a manner that is as firm as the service that Duke supplies to its native load and at a formula price based upon Duke's system average costs. Duke will be entitled to schedule Orangeburg's existing generation resources to serve the Company's load as part of its system resource portfolio. It is anticipated that the Agreement will save Orangeburg's customers approximately $10 million per year.

6. Orangeburg is not in Duke's control area and has never been a customer of Duke before. Orangeburg has not committed to be a Duke customer for any longer than the term of the Agreement. Orangeburg has no obligation to renew the Agreement at the end of its term, and the Agreement provides no stranded cost obligation. Duke is not committed to plan its system so as to be able to provide service to Orangeburg beyond the term of the Agreement.

[2] For ease of reference, the contract is sometimes referred to herein as having a ten-year term.

7. The Agreement includes conditions precedent that the Commission shall not reject the Agreement, or disapprove or reject the use of system average cost accounting for the Agreement for retail ratemaking, or subject its approval of the Agreement to a condition unacceptable to Duke. If one of the conditions precedent is not satisfied or waived as of May 1, 2009, Duke would be obligated to provide "contingent service" until December 31, 2010, unless the Agreement is terminated by Orangeburg earlier. Contingent service would be full requirements service at native load priority with prices based on Duke's incremental cost. If, after commencement of service, the Commission rejects the use of system average cost accounting, such a ruling would constitute a "material adverse ruling" if it increases costs allocated to Duke's wholesale customer class by more than a specified amount. In the event of a "material adverse ruling," Duke would have the right to terminate the Agreement if the parties are unable to renegotiate its terms. Duke would have to supply full requirements service to Orangeburg under the system average cost pricing for a period of 18 months after Duke's notice of termination. Duke may also have to provide service for an additional period of up to 12 months under pricing with a fixed demand rate and an incremental energy rate.

8. On June 20, 2008, Duke filed an Advance Notice as to the Agreement pursuant to Regulatory Condition No. 7(b) of the Merger Order issued on March 24, 2006, in Docket No. E-7, Sub 795. Duke gave notice of its intent to grant native load priority to Orangeburg "and to treat the retail native load of Orangeburg as if it is the Company's native load under Regulatory Condition Nos. 5 and 6."

9. Duke was ordered to comply with certain Regulatory Conditions as part of the Merger Order issued by this Commission in Docket No. E-7, Sub 795, a proceeding for approval of the merger of Duke and Cinergy Corporation. The Merger Order indicates that these Regulatory Conditions were important to approval of the merger, and Duke specifically agreed to the conditions by letter filed in that docket on March 27, 2006.

10. Regulatory Condition Nos. 5 and 6 of the Merger Order provide certain benefits to Duke's retail native load customers and to the retail native loads of certain historically served wholesale customers of Duke.

11. Regulatory Condition No. 5 provides, "Duke Power shall retain the obligation to pursue least cost integrated resource planning for its Retail Native Load Customers and remain responsible for its own resource adequacy subject to Commission oversight in accordance with North Carolina law. Duke Power shall determine the appropriate self-built or purchased power resources to be used to provide future generating capacity and energy to its Retail Native Load Customers, including the siting considered appropriate for such resources, on the basis of the benefits and costs of such siting and resources specifically to Duke Power's Retail Native Load Customers."

12. Regulatory Condition No. 6 provides, "The planning and dispatch of Duke Power system generation and purchased power resources subsequent to the Merger shall ensure that Duke Power's Retail Native Load Customers receive the benefits of those resources, including priority of service, to meet their electricity needs. Duke Power shall continue to serve its Retail Native Load Customers in North Carolina with the lowest-cost power it can reasonably generate or purchase from other sources before making power available for sales to customers that are not Retail Native Load Customers."

13. Regulatory Condition No. 7(a) of the Merger Order provides, "To the extent that Duke Power proposes to enter into wholesale power contracts that grant native load priority to the following historically served customers: Schedule 10A Customers, Town of Highlands, WCU, the electric membership cooperatives (EMCs) within Duke's control area, North Carolina Municipal Power Agency No. 1, Piedmont Municipal Power Agency, and Saluda River Electric Cooperative, Inc., Duke Power is not required to file an advance notice with the Commission or receive its approval. Subject to the conditions set out in subsection (d) below, the retail native loads of these historically served wholesale customers shall be considered Duke Power's Retail Native Load Customers for purposes of Regulatory Condition Nos. 5 and 6...."

14. Regulatory Condition No. 7(b) of the Merger Order provides, "Before granting native load priority to a wholesale customer other than as provided for in subsection (a) above or to other companies' retail customers, Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were Duke Power's retail native load pursuant to Regulatory Condition Nos. 5 and 6."

15. Regulatory Condition No. 7(d)(i) of the Merger Order provides that the Commission "retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes."

16. Duke may proceed with the Orangeburg Agreement at its own risk subject to the retail ratemaking ruling or policy statement given in this Order, but Duke may not treat the retail native load of Orangeburg as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6.

17. Duke and Orangeburg filed a Joint Petition for Declaratory Ruling pursuant to G.S. 1-253 and 62-60 on June 20, 2008. Duke and Orangeburg seek a declaratory ruling as follows: "For all native load priority wholesale contracts entered into subsequent to March 24, 2006, with terms of five years or more for customers located in North Carolina or South Carolina and priced at system average costs, the Commission shall allocate revenues from such contracts to wholesale jurisdiction and the allocation of wholesale costs to wholesale jurisdiction with respect to such contracts will be based on system average, or embedded, costs."

18. The evidence presented in this proceeding indicates that the adverse impact on North Carolina retail cost of service from adding the Orangeburg load to Duke's system would be an increase of 0.024 cents per kWh or approximately $14 million per year.

19. The factors that were cited in the testimony as allegedly helping to offset this monetary impact to the North Carolina retail cost of service cannot be quantified, and there is no evidence that the alleged unquantifiable benefits will outweigh the monetary impact of the Agreement on North Carolina retail ratepayers. Many of these alleged benefits either provide no benefit at all or provide only incidental benefit in the context of the Orangeburg Agreement.

20. The Cliffside coal plant, the Dan River and Buck combined cycle plants, and the proposed Lee nuclear station were all certificated or announced before the Agreement was signed. Cliffside is scheduled to come online in 2012; Dan River and Buck are scheduled to come online as combined cycle plants in 2012; Lee is scheduled for 2018 or later.

21. The "lumpiness" of new generating plant additions refers to the fact that generation is often added in blocks of capacity that exceed the utility's load growth from year to year, and, thus, the utility's reserve margin may exceed targets until the utility's load grows into the new capacity. Any contribution that the Orangeburg Agreement might make toward reducing any lumpiness that might arise during its term is speculative and incidental and does not in and of itself justify entering into the ten-year Agreement.

22. Duke has an obligation and a responsibility under Condition No. 6 to serve its retail customers with the lowest-cost power it can reasonably generate or purchase from other sources and an obligation under G.S. 62-131(b) to provide adequate, efficient, and reasonable retail service, and it has an incentive to lower its costs whether it provides service in the competitive wholesale market based upon system average costs or otherwise.

23. In any future retail ratemaking proceeding, the Commission should allocate the wholesale revenues and costs of the Orangeburg Agreement in the manner that produces the lowest cost power and just and reasonable rates for Duke's retail native load customers. Any such decision will be made on the basis of the evidence presented in that future proceeding. On the basis of the evidence presented herein and consistent with Duke's Regulatory Conditions and with the Commission's statutory responsibilities, the Commission gives a declaratory ruling or policy statement that it would be appropriate to allocate revenues from the Orangeburg Agreement to wholesale jurisdiction and to allocate the wholesale costs of the Agreement to wholesale jurisdiction based upon incremental costs in any future retail ratemaking proceeding.

SUMMARY OF ORAL ARGUMENT

Duke counsel stated that the Joint Petition is simply seeking clarity with respect to the rules that the Commission will employ regarding ratemaking as it relates to new wholesale contracts at native load priority, including the Orangeburg Agreement and future contracts. More specifically, Duke is seeking assurance that the fixed costs would be allocated on a system average basis in accordance with the respective contribution of the retail and wholesale jurisdictions to a company's peak load and that the revenues derived from wholesale customers will be allocated to the wholesale jurisdiction. Duke counsel explained that this issue is important for the Company and wholesale customers because cost and revenue allocation are important ratemaking issues in determining the economic value of a wholesale contract. Duke argued that regulatory conditions, including Regulatory Condition No. 7(d)(i), are an explicit threat that the Commission may choose to undo the traditional cost and revenue allocation methodology for wholesale contracts. According to Duke, this regulatory uncertainty creates inefficiency with regard to planning.

Duke contended that growth in its wholesale business is good for a number of reasons, including (1) additional wholesale customers can help share the cost burden, reduce "lumpiness", and help the Company achieve economies of scale at the front end of a growth and building cycle; (2) economic development; (3) the need for a stronger balance sheet which leads to a lower cost of capital and lower rates for retail customers; and (4) competition on the basis of system average costs is an incentive to keep costs low which benefits retail rates. Counsel for Duke noted that despite these benefits, some of which were essentially undisputed, some intervenors assert that the possibility of retail rate increases is enough to deny the Joint Petition. In response, Duke counsel argued that the Commission has found that to be an insufficient reason with respect to its review of advance notice proceedings filed by Progress. Further, Duke argued that its assessment shows that the impact of the Orangeburg Agreement on retail rates will be slight, if any. Duke noted that the methodology it used to perform this assessment was previously used by the Public Staff and assumes that new generation would be constructed to serve Orangeburg, which is just not the case.

With regard to the Commission's jurisdiction in this matter, Duke counsel stated that the declaratory relief mechanism is certainly appropriate given the uncertainties and controversy in this case regarding the proper interpretation of regulatory conditions and preemption. Finally, Duke counsel argued that it makes no sense to deny the request for a declaratory ruling as advocated by some intervenors. In so doing, Duke contends that the Commission would increase the risk that future action by the Commission would undo the economic basis upon which the wholesale contract is entered. Duke believes the effect of such a ruling would be to shut out Duke and any other North Carolina-based utility from serving the load of potential wholesale customers in the position of Orangeburg. In response to Commission questions, Duke counsel stated that the Commission clearly has a full record to appropriately make a decision on the relief sought by the Joint Petition.

Orangeburg counsel argued that the only thing that makes this case exceptional are the regulatory conditions, but also acknowledged that the only thing that really makes this case unusual is that Orangeburg happens not to be within the Duke traditional area. Orangeburg believes that the nature of the service should be considered in deciding the appropriate costing and contends that the nature of service is no different than Schedule 10A customers, which are wholesale customers that have traditionally been served by Duke.

Orangeburg counsel also noted that the issues of preemption and commerce clause equal protection have been raised in this proceeding. With regard to preemption, Orangeburg counsel contended that if the Commission rules such that the Agreement's prices are not properly reflected, it could effectively trap costs in a federally approved contract. However, when asked by the Commission whether there would be any trapped costs if Duke exercised its rights under the conditions precedent and did not sell Orangeburg power at the price in the contract but at some lower price, counsel for Orangeburg agreed there would be no trapped costs, but Orangeburg would not receive the benefit of its bargain. Regarding the equal protection argument, Orangeburg contends that retail customers of Orangeburg should not be treated at a disadvantage because they happen to be located within the transmission or traditional service area of a different utility. According to counsel for Orangeburg, constitutional law requires that Orangeburg not be treated in a disadvantaged way because of where they happen to be located geographically.

In response to Commission questions, Orangeburg counsel stated that it is requesting a determination from the Commission in this case that the Orangeburg load would not be treated differently from other similar load for ratemaking purposes. At oral argument, Orangeburg stated that such a determination by the Commission in this proceeding would be binding on future Commissions addressing cost recovery, but Orangeburg changed this position in its post-hearing filing.

Fayetteville counsel stated that one of the primary concerns that wholesale customers have in the Carolinas is that if the Commission were to impose, or even reserve the right to impose, regulatory conditions that relegate them to a lower class of citizenship in the context of purchasing electric power, then wholesale customers of an electric supplier will not have viable options. Fayetteville stated that if wholesale customers become captive to their current supplier, one would expect service from that supplier to be more expensive and less efficient than would be optimal. Fayetteville noted that FERC's wholesale policies are designed to accomplish competition. Fayetteville's concern from a policy perspective is that if the Commission reserves the right to engage in ratemaking or cost allocations that eliminate the choice of suppliers, the Commission would be doing something that would not create an economic environment that is as optimal as possible. Further, Fayetteville believes that the Commission would be engaging in activities that are preempted by constitutional law.

Fayetteville acknowledged that Duke had expressly authorized the Commission to defer ruling on how the costs should be allocated, and in so doing, Duke had waived these policy and constitutional arguments. However, Fayetteville stated that wholesale customers are not similarly restricted by the regulatory conditions or Duke's agreement to waive the right to challenge constitutional impediments. Fayetteville also argued that the Commission is restricted to a determination as to whether or not there is sufficient generating capacity to provide power reliably to both existing customers and new customers in reviewing wholesale contracts based upon Fayetteville's interpretation of a 2005 Supreme Court decision (discussed hereinafter). According to Fayetteville, that Supreme Court decision does not say that the Commission somehow has the right to engage in retail ratemaking that is inconsistent with wholesale ratemaking.

Counsel for Greenwood stated that it fully supports the arguments advanced by Duke and Orangeburg with respect to the public policy benefits of treating the Orangeburg and Greenwood contracts as native load contracts. Greenwood also supports the arguments with regard to the limitations of the Commission's authority with respect to wholesale contracts. With respect to Greenwood's specific situation, counsel noted that Greenwood has also entered into a ten-year power purchase agreement (PPA) with Duke which has been filed for review by the Commission. Like the Orangeburg Agreement, Greenwood's contract provides for native load priority based on the assumption that the Commission is going to permit the allocations of the contract consistent with Duke's system average costs. However, counsel emphasized certain factors which it believes make it clear that Greenwood is similarly situated to the other Schedule 10A customers served on a wholesale basis by Duke, several of which are exempt from the advance notice requirement of the regulatory conditions. First, counsel pointed out that Greenwood was a long-time wholesale customer of Duke that contributed revenues to Duke in payment of the capital costs of Duke's generating assets just like retail customers until Greenwood switched suppliers to SCANA in 1997. Second, when Greenwood terminated its agreement with Duke in 1997, Greenwood paid Duke an exit fee of over $5.4 million for stranded costs. Third, Greenwood has always been in Duke's control area or balancing authority area and is directly connected with Duke's system. In addition, Greenwood's current contract with Duke was purposely synced up to the current Schedule 10A customers so that these contracts all expire on the same timeframe. Given these facts, Greenwood contends that the return of Greenwood to Duke as a requirement supplier presents no more risk prospectively to Duke's North Carolina retail ratepayers than any other wholesale customer historically served by Duke under Schedule 10A.

Counsel for the Public Staff first stated that it was very important to note that the premise behind the request for a declaratory ruling is inaccurate. While supporters of the request refer to the Commission departing from traditional cost allocations and ratemaking treatment, there have only been three off-system wholesale contracts by Duke and PEC. Two of these were allocated incremental costs, which is the opposite of what Duke and Orangeburg are requesting. According to the Public Staff, the third contract was immaterial.

The Public Staff stated that Duke's argument about uncertainty and the need for certainty for purposes of planning seems beside the point since Orangeburg can leave as soon as the ten year contract ends with no stranded cost liability. Counsel for Public Staff added that even historically served wholesale customers are not guaranteed the traditional ratemaking treatment. Regarding Duke's contention that the Public Staff had not addressed all of the nonquantifiable benefits such as economic development, economies of scale, etc., in this proceeding, counsel for Public Staff stated that the Commission has already rejected all such reasons when CP&L made similar arguments in prior proceedings.

When questioned on whether the Commission could or should make a policy decision regarding how costs are going to be allocated on the basis of the evidentiary record of this proceeding, Public Staff counsel argued that the analysis used by Duke to determine the impact on retail rates due to the Orangeburg PPA was very rough and too speculative. Public Staff counsel also stated that it is not asking the Commission to reject the contract, nor impose any conditions on the contracts, because the Commission cannot. She noted that wholesale customers fought long and hard to get choice and market-based rates. FERC dockets are replete with the insistence of such by wholesale customers. However, Public Staff counsel argued that now wholesale customers want cost-based rates because market-based rates are higher. She contended that the PPA is constructed such that if the system average cost-based rates cannot be used to subsidize service to Orangeburg, the higher market-based rates would go into effect.

Regarding the Golden Spread case (discussed hereinafter), Public Staff counsel contended that the administrative law judge concluded that the utility improved its competitive position in making market-based sales by charging market-based customers lower system average fuel cost and collected the difference from the utility's cost-based customers who were forced to pay their own fuel costs and the difference between average cost and the incremental fuel cost associated with the market-based sale. According to her, the administrative law judge concluded that this was anti-competitive and FERC affirmed the ruling, saying that incremental cost should be used for fuel clause purposes for the market-based sale. The Public Staff believes this case rebuts the request in the Joint Petition.

The Attorney General argued that the Commission has the jurisdiction to review the grant of native load priority in the Orangeburg Agreement, regardless of whether it has been signed or not. In addition, the Attorney General contended that the Commission has the jurisdiction and authority to decide what the proper allocation of cost for the Agreement should be in a Duke general rate case where that is a proper issue to be decided. Regarding the 2005 Supreme Court decision, the Attorney General explained that proceeding really talked about presale or presigning of contract review. However, the Attorney General stated that the basis of the Court's decision was the recognition that the Commission must protect captive retail ratepayers and their right to reliable and adequate service which does not hinge on whether the contract has been signed or not. In addition, the Attorney General stated that the decision addressed only

the reliability and adequacy issues before it based on the facts in that proceeding. However, the Attorney General proffered that the principles that the Supreme Court examined on preemption in that proceeding would apply equally to other public interest concerns that the Commission should look at in deciding both whether there should be a grant of native load priority in this Agreement and how costs and revenues of the Agreement should be allocated. The Attorney General believes that such concerns should include the public health issues of generating electricity since G.S. 62-2 requires the Commission to adopt and enforce public policy that puts the generation of electricity in harmony with the environment. For example, in recent certificate proceedings involving Cliffside, Buck, and Dan River, the Commission conditioned the issuance of certificates on the retirement of older coal units for efficiency and environmental reasons. In this proceeding, Duke is assuming the obligation to serve 190 MW, where they have no legal obligation, which runs contrary to the idea of moving Duke towards retiring plants that are no longer efficient and need to be retired for environmental purposes. According to the Attorney General, another public interest concern is whether captive retail ratepayers should be required to assume the risk to build capacity needed to serve Orangeburg at native load priority.

Finally, in response to Duke's point that, if the Commission does not issue a favorable declaratory ruling, Duke would be shut out of the wholesale market due to the risk and uncertainty, the Attorney General responded that participation in any free and competitive market has inherent risk and uncertainty. The Attorney General also stated that it is not the Commission's job to alleviate those uncertainties for Duke or any other party. Rather, according to the Attorney General, the Commission's job is to properly allocate those costs in a general rate case, as required by the statutes, and not here prior to the Agreement even going into effect.

Counsel for Progress stated that the policy of the Commission is that it reserves the right to allocate costs of wholesale contracts in a fact-based rate case and this policy is clear. A party such as Duke that wishes to engage in a competitive endeavor out of its control area should assume the risk of cost allocation, as has Progress. Progress stated that the Commission's authority is primarily with respect to the protection of captive retail ratepayers in North Carolina. Progress stated that, in the context of this one contract-specific event, the Commission is being asked to commit that it will allocate the cost for this Agreement and potentially many others in such a way that wholesale customers will be on the same footing with respect to cost and reliability as captive retail ratepayers. Progress believes such a decision should be made in the context of a rate case where more facts are available to the Commission. Progress argued that the Commission should decline to resolve the uncertainty crafted in the Orangeburg Agreement under a proper interpretation of the Declaratory Judgment Act.

Counsel for NC WARN stated that since 2005 Duke and other utilities have been talking about building tens of billions of dollars in new base load plants. NC WARN argues that energy efficiency is a good solution to avoiding this costly overbuilding. NC WARN points out that the 190 MW of the Orangeburg peak load, 60 MW of Greenwood peak load; 476 MW of Fayetteville peak load, and potentially other additional wholesale

contract loads, would be allowed at native load priority and system average cost under the requested declaratory ruling. In effect, NC WARN stated that there would be no difference between the native load priority outside Duke's service area and everybody else in its service area. According to NC WARN, it seems fundamentally unfair that whatever present Duke customers are doing to save electricity and become more efficient and save a lot of capacity, Duke can then freely negotiate these wholesale contracts and sell that power outside of its service area and provide wholesale customers with native load priority.

In rebuttal, counsel for Fayetteville stated that certain intervenors had noted that Duke would be incurring very large costs to build generation. Fayetteville emphasized that one of the benefits of including wholesale customers in average cost rates is that Duke and Duke's retail ratepayers would then have a larger body of customers with which to allocate and share costs. With regard to the contention of intervenors that it would be better for the Commission to wait and make the cost allocation in a rate case, Fayetteville submitted that justice delayed would be justice denied.

Counsel for Orangeburg also rebutted certain arguments made by other intervenors. With respect to the costs of new generation and environmental concerns, Orangeburg stated that Duke's evidence would show that the Orangeburg load would not cause Duke to add any generation or prevent Duke from retiring any plants. Rather, Orangeburg would have the beneficial effect of spreading the cost for retail customers. With respect to the arguments concerning the traditional cost allocation for wholesale contracts, Orangeburg's request for traditional cost allocation is not focused on wholesale contracts outside of the balancing authority, but rather, wholesale cost allocation generally. Orangeburg argued that there is no basis in terms of the nature of the service to be provided to Orangeburg for treating the Orangeburg load differently from the other wholesale load or from retail load for cost allocation purposes. To that extent, Orangeburg also argued that the FERC's Golden Spread decision was different because that case involved a different kind of service. Orangeburg also contended that certain intervenors' interpretation of Regulatory Condition No. 6 would violate the Commerce Clause.

Duke counsel also rebutted several points made by intervenors. First, Duke acknowledged that a different Commission could make a different determination at some point in the future, but Duke stated that it is asking for certainty in that "interim period" that Duke and its potential wholesale customers could rely upon until it may be changed. Despite contentions by Progress that the Commission has carefully and deliberately established a policy that only wholesale customers embedded in a utility's control area should be afforded native load priority status, Duke argued that the Commission has not and cannot legally establish such a policy because of federal preemption. More importantly, Duke believes that the real question is what the policy should be considering the benefits of economies of scale, economic development, competing on the basis of system average cost, better balance sheets, and lower cost of capital. Duke argues that the Commission should adopt rules about how wholesale

contracts with native load priority are going to be treated for ratemaking purposes to foster such benefits.

Finally, Duke took the position that the Commission has all the facts to decide the cost allocation issue now in this proceeding. If there is a future wholesale contract which the Commission believes presents some kind of reliability issue, that matter can be dealt with at that time since Duke or Progress must bring it before the Commission under the regulatory conditions. Duke also submitted that changing the traditional cost allocation policy of wholesale contracts results in a customer being captive to the incumbent utility. According to Duke, changing the traditional allocation policy would benefit Southern Company or some other utility outside the jurisdiction of the Commission and harm North Carolina utilities.

SUMMARY OF EVIDENCE

The following parties submitted testimony: Duke, Orangeburg, Greenwood, and the Public Staff.

Duke witness Ruff, President of Duke, stated that the purpose of her testimony was to discuss the importance of the requested approval to Duke, and the policy bases for the Joint Petition for declaratory relief. She testified that wholesale electric customers in the Carolinas need access to reliable, cost effective supplies of energy in order to attract and retain businesses in their communities and improve the standard of living for their citizens. According to her testimony, several of these wholesale customers had issued Requests for Proposals for that purpose. She noted that Duke has provided advance notice to the Commission that it has entered into wholesale contracts to provide service at native load priority within the past year. She believed that uncertainty regarding the Commission's future ratemaking treatment for wholesale contracts at native load priority creates significant uncertainty and risk, not only for Duke but for current and prospective wholesale customers. Therefore, she contended that it is in the best interests of wholesale providers and their retail customers, as well as in the best interests of the States of North Carolina and South Carolina as a whole, that such uncertainty be resolved as soon as possible.

In her testimony, she explained that Duke had completed a review of the wholesale market in the Carolinas and concluded that it had the opportunity to integrate the needs of potential wholesale customers with the generation planning the Company is facing over the next decade. She testified that the Company intends to manage its wholesale growth to ensure no material harm to customers and believes there are advantages to retail customers that largely outweigh any potential detriment.

She noted that the Commission has adopted regulatory conditions retaining the Commission's right to assign, allocate, and make pro forma adjustment to the revenues and costs associated with wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes. Witness Ruff stated that cost allocation and ratemaking are critical to determining the economic value of such transactions, and

leaving ratemaking and cost allocation decisions undecided until future proceedings created unnecessary uncertainty that impacts the Company, Orangeburg, and other prospective wholesale customers' ability to negotiate PPAs. She also pointed out that the Orangeburg PPA contains provisions that provide for contingent service at alternate, higher rates or that would allow Duke to terminate the PPA in the event that the Commission does not approve the use of system average cost accounting as requested in the Joint Petition. She stated that the uncertainty caused by the requirement of such conditions in wholesale PPAs under negotiation has had a chilling effect on negotiations because potential wholesale customers want to secure service at firm terms. Accordingly, witness Ruff testified that Duke's requested declaratory ruling is needed to establish certainty with regard to cost allocation and to promote the benefits of a competitive wholesale market in the Carolinas. She asserted that Duke is simply asking for the Commission to establish consistent rules now that will be consistently applied.

Witness Ruff added that approval of the Joint Petition would encourage wholesale competition, and thereby promote the availability of the best priced and reliable electricity, which wholesale customers could then pass along to their customers. She stated that Duke recognizes the need to proceed without harming its retail customers, and believes that all retail customers benefit from strong regional economic growth.

Without state regulatory treatment that allows in-state utilities to assign costs for new wholesale contracts at system average costs, witness Ruff believes that in-state utilities ability to compete for new wholesale load would be greatly diminished. She stated that incumbent utilities have no obligation to serve wholesale providers once existing contracts expire. If other in-state utilities could not competitively bid based on system average cost, witness Ruff testified that it would place North Carolina's wholesale customers at a distinct disadvantage and would be contrary to the public interest.

Duke witness Rose, Managing Director of ICF International, testified that wholesale sales encourage efficiency and economies of scale in electric generation and thereby lower the costs of electricity for both wholesale and retail customers. He stated that it has long been national policy to encourage wholesale integration and contracting to facilitate economies of scale. Because of economies of scale, the most economical way to add baseload capacity is in large increments of generation. He opined that properly managed growth in wholesale sales can share in the costs of this capacity, and in doing so, wholesale sales actually assist retail ratepayers. He added that two prominent industry trends, a rapid increase in the capital costs of new power plants and the need for new baseload power plants, emphasize the importance of economies of scale. In light of these trends, he believes that Duke is pursuing the correct course of action in terms of positioning the Company and its customers for maximum economies of scale.

In support of Duke's requests for the declaratory ruling, witness Rose testified that companies which compete based on average costs of service have incentives to

lower their average costs. In the absence of policies to promote such competition, he stated that local wholesale entities will have decreased choices since service from more distant entities can be difficult due to transmission limitations. He also stated that lower rates that result from wholesale competition and economies of scale help to attract industry and promote economic development, which benefits all stakeholders.

According to witness Rose, the standard procedure for the division of costs between wholesale and retail jurisdictions is on the basis of system average costs. He stated that the predicate for this cost of service allocation is that the seller should be able to plan for wholesale load in a manner consistent with how it plans for retail customer load. He added that planning requires wholesale sales to be of sufficient duration and firmness to enable supply planning to take into account the lead time for new generation supply. He noted the testimony of Duke witness Hager, who testified that Duke has included firm wholesale load in its integrated resource planning (IRP).

Witness Rose also testified that uncertainty is inefficient, counter-productive, and raises costs. He elaborated that he was currently involved in a case at FERC in which FERC reviewed a utility's wholesale contract on an ex post basis. This proceeding has extended over many years leading to refund requirements, numerous appeals, and requests for clarification on the details of the refunding. He believed that this case illustrated the pitfalls on an ex post review and that a declaratory judgment at the time of contracting would have avoided the entire situation. Accordingly, he recommended that the Commission approve Duke's request for a declaratory ruling in favor of the contract's cost allocation principles. Witness Rose stated that an ex post review of the Orangeburg contract and other future contracts creates uncertainty and risks that deter wholesale contracting, which inhibits the economies of scale, competition, and joint planning needed to optimize customer rates and stimulate economic growth.

Duke witness Hager, Managing Director of Integrated Resource Planning and Environmental Strategy for the operating utilities of Duke Energy Corporation, testified that Duke's recent IRPs have included undesignated wholesale load. She noted that Duke's 2007 IRP included undesignated wholesale load growing to 500 MW in 2012 and thereafter as being representative of potential future wholesale load. She stated that this load was treated identically to all other load within the annual plan that the Company is planning to serve. In addition, she testified that since the 2007 Annual Plan was filed, the Company subsequently entered into wholesale contracts, and filed advance notices with the Commission, of agreements with Orangeburg, Piedmont EMC, and Blue Ridge EMC, which total approximately 400 MW of initial peak load impact.

In her testimony, witness Hagar testified that when the Company adds a 600 or 800 MW generating unit, the reserve margin may exceed the target planning reserve margin for a year or two until the load grows into the new unit. She explained that new wholesale load can mitigate the impacts of the "lumpiness" of new generation in two ways. First, new wholesale load can share in the costs of these new large assets, reducing the impacts of these large capital additions on retail customers. Second, firm-as-native-load wholesale load is included in the measurement of the Company's

reserve margin and the addition of wholesale load will reduce the amount and duration that the reserve margin will be above target planning reserve margins.

In rebuttal testimony, witness Hager responded to the testimony of intervenors regarding the benefits of Duke's IRP planning from the addition of the Orangeburg wholesale load and additional wholesale load. She also discussed the relationship between wholesale load, integrated resource planning, and certain of the regulatory conditions in the Merger Order.

Witness Hager disagreed that the Company had presented no evidence to indicate that the addition of the Orangeburg load would provide benefits by mitigating the impacts of lumpy generation additions. She stated that her direct testimony discussed how the Company's need to add large increments of new intermediate and baseload generation will increase the reserve margin for several years until the load grows into the new generation assets. She explained that the addition of this new wholesale load smoothes out this increase in the reserve margin and also adds wholesale customers who share in the costs of this new generation.

Witness Hager also testified that Duke will receive generation entitlements from certain wholesale customers, including Orangeburg. The addition of these new resources provides diversity to the system and an additional resource to use when other resources are unavailable or load is higher than anticipated.

She also stated that Duke will ensure that there will be no detrimental impact to system reliability from the addition of the Orangeburg load or any other additional wholesale load the Company may add through the IRP process. She noted that each MW added to Duke's system, whether through retail load growth, traditional wholesale load growth, or the addition of new retail or wholesale load, must be served with capacity and energy. Conversely, witness Hager testified that the addition of Orangeburg would not require the addition of resources. According to her testimony, Duke's IRP process seeks to achieve the objectives included in Regulatory Conditions Nos. 5 and 6 of the Merger Order. She added that the inclusion of a level of projected new wholesale load within the integrated resource planning principle is not a violation of Regulatory Conditions Nos. 5 and 6, but rather an anticipation that such treatment will be allowed by the Commission. If the Commission does not allow the Company to treat wholesale customers in the requested manner, the Company will adjust its resource plans.

Finally, in response to intervenor testimony regarding the treatment of PEC's native load priority wholesale contracts, witness Hager testified that PEC had allocated system average fuel costs, rather than incremental costs, associated with its native load priority contract with the City of Seneca, South Carolina.

Duke witness Svrcek, Vice President of Business Development & Organization for Duke Energy Corporation, described the May 23, 2008 wholesale PPA between Duke and Orangeburg. According to his testimony, Duke will provide Orangeburg's full

load requirements for the contract term of May 1, 2009, through December 31, 2018. Orangeburg serves approximately 25,000 electric customers and its total annual peak load is projected to be approximately 190 MW in 2009 and is expected to grow at approximately 1% per year. Duke will supply Orangeburg at native load priority and at a formula price based upon the Company's system average cost. In addition, Duke will be entitled to schedule Orangeburg's 23.5 MW of generation resources as part of Duke's system resource portfolio. The PPA also allows Duke to make its DSM programs available to Orangeburg's retail customers.

Witness Svrcek testified that Orangeburg's current wholesale contract with SCE&G expires on April 30, 2009. In anticipation of the expiration of the contract, Orangeburg initiated a process to receive bids. Orangeburg found Duke's service proposal more attractive than SCE&G's proposal, and Duke and Orangeburg negotiated for almost a year prior to executing the PPA. He stated that the provision of service at native load priority and at system average costs was of critical importance.

According to witness Svrcek, because of the uncertainty regarding future ratemaking treatment for the Orangeburg PPA, the PPA contains provisions that apply in the event that the Commission rejects the use of system average cost accounting for the PPA, either prior to or after the contract start date. Prior to the service commencement date, the PPA contains conditions precedent that the Commission shall not have disapproved or rejected the PPA or the use of system average cost accounting for retail ratemaking or regulatory accounting and reporting purposes, or approved the PPA with a condition unacceptable to the Company, among other items. He testified that if one of the conditions precedent is not satisfied, then Duke would be obligated to provide "contingent service" from May 1, 2009, until December 31, 2010, unless Orangeburg terminates the agreement with 30 days notice or upon commencement of new retail rates in North Carolina or South Carolina. Witness Svrcek stated that such contingent service would be full requirements service at native load priority, but based upon Duke's incremental cost, rather than system average. Witness Svrcek believed that this situation would be very adverse to Orangeburg. After commencement of service on May 1, 2009, a Commission ruling rejecting the use of system average cost accounting would constitute a "Material Adverse Ruling" under the PPA if it increases the costs allocated to the agreement by more than a specified amount. Witness Svrcek stated that in the event of a Material Adverse Ruling, the Company would have the right to terminate the PPA if the parties are unable to renegotiate the terms of the PPA. However, Duke would have the obligation to continue to supply full requirements service to Orangeburg under the system average cost pricing for a period of 18 months after the Company's notice of termination. The Company may also be obligated to provide service for an additional period of up to 12 months under pricing with a fixed demand rate and an incremental energy rate. Witness Svrcek testified that this situation would be adverse to both Duke and Orangeburg and Orangeburg would have to arrange for service of all of its requirements from other suppliers within a short time frame where available suppliers are limited in number.

Witness Svrcek added that Duke is actively participating in the wholesale market and exploring opportunities to serve such customers in North Carolina and South Carolina. He believes that the PPA provisions discussed in his testimony demonstrate the impact of the regulatory uncertainty that currently exists regarding regulatory treatment of such wholesale contracts at native load priority. He contended that Duke's discussions with potential wholesale customers have highlighted the need to eliminate uncertainty in this area as these providers are seeking to secure firm terms to supply the electricity needs of their customers at cost effective rates that minimize the economic hardship on customers and to help attract economic development opportunities to support the long-term viability of these communities.

Duke witness Shrum, Vice President, Rates for Duke, testified concerning the Company's retail and wholesale customer mix. She also presented the Company's analysis of the impact of wholesale sales to Orangeburg on Duke's retail customers, as well as sensitivities related to larger wholesale loads. Witness Shrum testified that Duke has always served wholesale customers, but the wholesale customer's share of Duke's peak demand has dropped significantly in recent years. According to her testimony, at the time of Duke's 1991 general rate case, the mix was 88.2% retail and 11.8% wholesale. However, at the end of 2007, the mix was 96.1% retail and 3.9% wholesale. With the addition of Orangeburg's peak load of 190 MW, the distribution of retail and wholesale peak load is estimated to be 95.1% retail and 4.9% wholesale.

To analyze the effect of Orangeburg on retail ratepayers, witness Shrum stated that the Company utilized the approach that had previously been used by the Public Staff to assess the impact of additional wholesale sales on retail cost of service. Witness Shrum explained that this analysis compares the benefits of spreading Duke's generation system fixed costs to additional wholesale sales to Duke's incremental generation cost of supplying those additional sales. The cost of supplying the additional sales is based on Duke's avoided costs. Witness Shrum testified that the Company's generation system fixed costs are traditionally allocated among retail and wholesale native load customers based on their contribution to summer coincident peak demand. Therefore, she stated that the addition of wholesale native load will increase the percentage of existing fixed costs allocated to wholesale customers, with an equivalent decrease in the amount of fixed costs allocated to retail customers.

Witness Shrum testified that the results of this analysis, which illustrates the impact of adding incremental load on the North Carolina retail cost of service, are shown on Confidential Shrum Exhibit 1. The version of this exhibit that was attached to the pre-filed testimony of witness Shrum, which was filed on August 15, 2008, shows that the net increase in the NC retail system average generation cost for the Orangeburg PPA was 0.01¢/kWh, a 0.21% increase, or approximately $6 million annually. (These amounts were disclosed in open hearing, but the underlying detail was set in this confidential exhibit.) Witness Shrum stated that this increase shows a de minimis impact upon the retail cost of service. In addition, because Duke witness Ruff testified that Duke is also negotiating to serve additional wholesale customers, witness Shrum performed this analysis to determine the impact of additional wholesale

loads of 500 MW, 1,000 MW, and 1,500 MW. She testified that in each case, the analysis continued to show a de minimis net effect on retail generation cost of service as follows: 0.027¢/kWh or a 0.54% increase for 500 MW, 0.053¢/kWh or a 1.06% increase for 1,000 MW, and 0.077¢/kWh or a 1.55% increase (or approximately $46 million annually) for 1,500 MW. Witness Shrum added that the impact of additional load on the Company's system average generation costs would not differ between retail and wholesale incremental load.

Witness Shrum also testified that retail rates are benefited by the ability to spread fixed costs over additional wholesale load, resulting in a lower percentage of those costs allocated to retail customers. She explained that the fixed costs of generation capacity, whether historical embedded costs or the cost of new generating capacity, are allocated among all customers receiving firm-as-native-load service. Both retail and wholesale customers are allocated a share of the system generation costs based upon their contribution to the Company's summer peak load. She then noted that Duke witness Hager described the "lumpiness" created when generation is added to the system in large increments that may be greater than the load growth a utility experiences from one year to the next. Witness Shrum stated that in such a situation, the absence of new wholesale load would create a greater cost burden for retail customers because there would not be the additional wholesale load to share that burden.

During her direct examination, witness Shrum testified that she had prepared an update to Confidential Shrum Exhibit No. 1, which was identified and admitted as Confidential Updated Shrum Exhibit No. 1. This updated exhibit was filed on November 10, 2008. Witness Shrum explained that this updated exhibit reflected an update of Duke's avoided costs which were used in her analyses. According to witness Shrum, this updated exhibit shows that the net increase in NC retail system average generation cost for the Orangeburg PPA had increased from 0.01¢/kWh or a 0.21% increase (or approximately $6 million annually) to 0.022¢/kWh or a 0.45% increase (or approximately $13 million annually). Likewise, the impact of 500 MW, 1,000 MW, and 1,500 MW additional wholesale loads also increased to equal 0.058¢/kWh or 1.16% for 500 MW, a 0.112¢/kWh or 2.26% for 1,000 MW, and 0.164¢/kWh or 3.3% for 1,500 MW. The annual revenue impact for 1,500 MW increased from $46 million to $99 million.

Witness Shrum also filed rebuttal testimony in response to the testimony of intervenors. In her rebuttal, she stated that that the Company's analysis to determine the impact of adding wholesale load on the retail cost of service was based upon the same methodology previously used by the Public Staff in analyzing two other wholesale contracts that Duke had entered. She opined that this analysis, while simple in its approach, is based on current and actual numbers, whereas any other analysis would require the use of many assumptions about the future. She believed that this approach is a logical way to assess the impact on cost of service of adding incremental load and may overstate the impact on retail ratepayers by assuming incremental generation capacity is needed immediately upon entering into a wholesale contract. She described

the methodology as a simple, but "very indicative analysis of, if I add load and I have to add capacity and incremental energy to serve that load, what would the affect on North Carolina rate payers be?" Neither the Public Staff nor any other party offered an alternative methodology for rate impact analysis.

With regard to the $13 million annual impact of Orangeburg and $99 million annual impact of 1,500 MW, witness Shrum stated that such figures are not insubstantial sums. However, she stated that such impacts are very small when compared to the Company's total retail cost of service and when spread over all of the Company's customers and in exchange for all of the system economic development and other benefits discussed in the Company's testimony.

Witness Shrum also stated that she disagreed with the assertions regarding sunk costs contained in the testimony of Public Staff witness Maness. She argued that sunk costs, as used in Regulatory Condition No. 7(d)(i), refers to the situation where Duke may have incurred costs for capacity to serve new wholesale load that results in a higher than needed reserve margin and are thus stranded costs. Such costs are sunk costs in that they are dollars already spent. According to her, Duke acknowledges and has accepted the risks that those costs may not be allocable to retail ratepayers.

Finally, it should be noted herein that on December 4, 2008, which was subsequent to the hearing, Duke filed Confidential Revised Shrum Exhibit No. 1, which further adjusted the amounts previously set forth on Confidential Updated Shrum Exhibit No. 1. According to Duke, this revision was made in accordance with the update to its avoided cost energy costs that were filed on December 3, 2008 in Docket No. E-100, Sub 117. This revised exhibit shows increases in the average NC retail generation costs of serving additional wholesale loads as follows: 0.024¢/kWh or a 0.48% increase (or approximately $14.5 million annually) for Orangeburg; 0.062¢/kWh or a 1.25% increase for 500 MW; 0.121¢/kWh or a 2.44% increase, for 1,000 MW; and 0.177¢/kWh or a 3.56% increase (or approximately $107 million annually) for 1,500 MW.

Orangeburg witness Boatwright, Manager of the city's Department of Public Utilities, discussed the context and importance of the PPA to Orangeburg and its customers. In his testimony, witness Boatwright discussed the electric system and load of Orangeburg and provided certain demographic information for Orangeburg County, South Carolina. Witness Boatwright testified that Orangeburg began purchasing its wholesale power supplies from SCE&G Company's predecessor company in approximately 1919. Approximately 2.5 years ago, Orangeburg informally solicited power supply offers from companies in anticipation of the expiration of the current contract with SCE&G. Orangeburg received proposals from SCE&G and Duke and then determined that Duke's proposal was more favorable. Orangeburg and Duke spent more than a year in negotiations and entered the PPA.

Witness Boatwright stated that the most important aspects of the PPA for Orangeburg are that it provides a reasonably priced, dependable source of firm power

for a period of 10 years, from a company with an outstanding reputation for reliability and reasonable costs. According to him, the fact that the contract provides for System Average Pricing and native load status for Orangeburg is critical. He testified that native load status assures a firmness of supply equal to that of Duke's retail customers and is consistent with the price of the service Orangeburg has agreed to buy. He added that it is also important to Orangeburg that it anticipates the PPA will save Orangeburg's customers approximately $10 million per year over the life of the PPA.

If the Commission rules against the requested relief prior to the commencement of service, witness Boatwright explained that the Agreement could terminate, although Duke would be obligated to provide "Contingent Service" under the Agreement. However, he believed that Contingent Service would not be a satisfactory result for Orangeburg, since pricing is much more onerous than system average pricing and Orangeburg would be forced to scramble for alternative supply in a very compressed time frame. He also explained that if the Commission's ruling were delayed, or if the Commission issued no definitive ruling prior to commencement of service but at some later time took action deemed to be "Material Adverse Ruling" under the PPA, then Duke would have the right to terminate the Agreement if the parties were unable to renegotiate its terms. In that case, he stated that Orangeburg would only receive limited protections and would again be forced to arrange service for all of requirements from other suppliers in a short time frame where available suppliers are likely to be limited in number. Witness Boatwright testified that these options are very unattractive to Orangeburg and would likely result in significantly higher rates for its customers.

Greenwood witness Brown, Managing Principal of Public Utilities Advisors' Network, Inc., testified that Greenwood is in Duke's balancing authority, and was a long-standing customer of Duke for decades when the majority of Duke's existing generation was planned and added. She noted that when Greenwood terminated generation services from Duke in 1997, Greenwood paid Duke $5.4 million for stranded costs which prevented shifting of such costs to Duke's retail ratepayers. She testified that while Greenwood was historically served as a Schedule 10A customer of Duke, the Merger Order did not specifically exclude Greenwood from the requirement to file advance notice of Duke's intent to grant native load priority. Witness Brown also testified that Greenwood and Duke have now entered into a long-term power purchase arrangement whereby Greenwood will be reestablished as a full-requirements customer of Duke. She avowed that this arrangement is substantially the same as the power supply arrangements recently negotiated between Duke and the current Schedule 10A customers and that it would be arbitrary and capricious for the Commission to accept average cost pricing for Schedule 10A customers, but disapprove of such pricing for Greenwood.

Witness Brown testified that Greenwood is faced with a tremendous amount of uncertainty and risk due to the regulatory condition in the Merger Order wherein the Commission retains the right to assign, allocate and make other adjustments to the wholesale revenues and costs. While she acknowledged that the Commission may change allocation methodologies or assignments during any ratemaking proceeding,

she stated that the greatest uncertainty is whether the Commission will choose to treat wholesale contracts differently than the retail load or the specifically-exempted wholesale load. Further, if the Commission chose to treat Greenwood in a manner other than system average cost, she contended that Greenwood could be faced with termination of its power supply agreement and higher costs of power supply. Therefore, she recommended that the Commission grant the petition of Duke and Orangeburg for a declaratory ruling that Duke's new wholesale contracts with native load priority will be treated for ratemaking purposes in the same manner as Duke's existing wholesale contracts with native load priority. At a minimum, she urged the Commission to consider Greenwood's specific facts and circumstances when issuing a generic ruling.

Public Staff witness Maness, Supervisor of the Electric Section of the Accounting Division of the Public Staff, presented certain of the Public Staff's technical and policy-related concerns regarding the Joint Petition for a Declaratory Ruling. According to his testimony, the first specific concern of the Public Staff regarding the requested declaratory ruling is that it would largely eliminate the protection for NC retail ratepayers established by the Merger Order in Regulatory Condition Nos. 5, 6, and 7, which were found to be necessary by the Commission for Duke's merger with Cinergy Corporation to be approved. Witness Maness stated that Regulatory Condition Nos. 5 and 6 require Duke to retain its obligation to pursue least cost integrated resource planning and to dispatch its system supply-side resources specifically for the benefit of its Retail Native Load Customers. He noted that Regulatory Condition No. 7(d)(i) states that "the Commission retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with ...[those] contracts for both retail ratemaking and regulatory accounting and reporting purposes." Further, he contended that the subparagraph 7(d)(ii) indicates that Duke's entry into wholesale contracts that commit Duke to provide native load priority constitutes acceptance by Duke of the risks that supply-side resource costs incurred to fulfill that commitment "may become uneconomic sunk costs that are not recoverable from Duke's retail ratepayers." In other words, witness Maness believes that Duke cannot presume that any costs irrevocably committed or incurred to meet such commitments will be recoverable from NC retail ratepayers prior to a specific Commission decision addressing those costs. He believes this is true regardless of whether or not the incurrence of such costs were prudent in light of that commitment.

Witness Maness testified that a ratemaking decision with respect to the costs associated with commitments to provide native load priority should be made in a case-specific setting, and often well after the date of the contract. He listed a number of reasons why he believed this was true, including the following: (1) prudence is not a determinative factor, as noted above; (2) the types of wholesale power sales arrangements that can take place are very diverse; and (3) the actual costs associated with such commitments may not be quantifiable for some time after the contract takes effect. He claimed there is no place under Regulatory Condition Nos. 7(d)(i) and (ii) for a general, presumably binding declaration that a specified type of treatment for retail ratemaking purposes is appropriate for all such power sales arrangement. Further, he noted that the Commission found that all of the regulatory conditions were necessary in

order to approve Duke's merger with Cinergy and Duke accepted Regulatory Condition No. 7 and supported its adoption by the Commission. He stated that it would change the carefully bargained-for and Commission-approved balancing of risks and rewards associated with the merger if Regulatory Condition No. 7 was eliminated or changed at this time.

The second specific concern of the Public Staff expressed by witness Maness was that the relief sought by the Joint Petition could well result in an increase in the costs charged to NC retail ratepayers. He pointed out that Duke witness Shrum's analysis indicates that the addition of the Orangeburg load and up to 1,500 MW of wholesale load at native load priority results in increases in the cost of serving NC retail ratepayers. While witness Shrum referred to the cents per kwh increases shown in her testimony as de minimis, witness Maness stated that the annual dollar net costs produced by her analysis of $6 million for Orangeburg, and $46 million for an increase in wholesale load of 1,500 MW, are substantial and not de minimis in the opinion of the Public Staff. With regard to the testimony of Duke witness Shrum that the methodology she used in her analysis was previously used by the Public Staff, Public Staff witness Maness stated that the analysis was a rough estimate.

Witness Maness also testified that Duke had presented no evidence to indicate that the Orangeburg load would mitigate the cost impacts of "lumpy" additions. He added that the possibility of such a benefit arising on certain occasions did not justify the generic type of finding requested in the Joint Petition. Witness Maness stated that the Public Staff has the same opinion when it comes to the general assertions of economic benefit potential cited by Duke in this proceeding. In the opinion of the Public Staff, the Commission's primary concern should be the direct impact of specific wholesale contracts on NC retail rates, and a generic finding of the type sought in the Joint Petition cannot be supported by general references to economic benefit potential. Witness Maness recommended that the Commission deny the Joint Petition.

DISCUSSION AND CONCLUSIONS AS TO INTERPRETATION OF CONDITION 7(b)

The Public Staff has raised a preliminary question as to whether Duke's advance notice was timely filed. Duke's Condition No. 7(b) provides that "[b]efore granting native load priority to a wholesale customer...Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were Duke Power's retail native load pursuant to Regulatory Condition Nos. 5 and 6." Here, Duke signed the Orangeburg Agreement before filing its advance notice. The Agreement was signed May 23, 2008; advance notice was filed June 20, 2008; delivery of electricity to Orangeburg is to commence May 1, 2009.

The Public Staff asserts that signing the Agreement, even with its conditions precedent, prior to filing advance notice was contrary to Condition No. 7(b). The Public Staff argues, "The conclusion is inescapable that Duke was well aware of the intent behind the Commission's requirement of an advance notice and the importance of a

wholesale contract not yet being signed in an analysis of federal preemption." Duke, on the other hand, argues that Condition No. 7(b) "says nothing about providing the required notice prior to executing the contract." Duke apparently reasons that native load priority is "granted" when electricity is actually delivered, not when the contract is signed, and that the filing of the advance notice was timely. Duke says that the Public Staff is "overlooking the plain differences between the Duke Energy and Progress conditions": that PEC's condition requires notice in advance of a contract "being executed" but Duke's Condition No. 7(b) is substantially different.[3]

The Commission of course recognizes that it must deal with Duke's present advance notice as filed. The Commission will, however, take this opportunity to address the issue raised by the Public Staff in order to offer guidance as to future advance notice filings. The Commission agrees with the Public Staff. The Commission reaches its conclusion upon two lines of reasoning: the language of Condition No. 7(b) and the context in which the condition was adopted.

The key language in Condition No. 7(b) (with emphasis added) is as follows: "[b]efore granting native load priority to a wholesale customer...Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer...." Duke equates "granting native load priority" with the actual first delivery of electricity, which is not scheduled to take place until this coming May, but the Commission disagrees. To "grant" means to "consent to a request; agree to (do); agree to, promise, undertake; consent *to do*, *that*; accede to, consent to fulfill (a request, etc.)...; give or confer (a possession, a right, etc.) formally; transfer (property) legally...." Shorter Oxford English Dictionary, Fifth Edition (2002). The Commission concludes that Duke "granted" native load priority when it signed the contract with Orangeburg and legally obligated itself to perform. Other words used in Condition No. 7 -- such as "advance," "proposed," and "intent" -- all indicate that notice is to be filed before a contract is signed. So does the language of Condition No. 59(b)(i), which provides, "Advance notices of activities to be undertaken shall not be filed until sufficient details have been decided upon to allow for meaningful discovery as to the proposed activities." Condition No. 59(b)(i) assumes that notice will be filed in advance of a contract being signed; it is designed to assure that notice will not be filed so far in advance that the details of the sale have not been worked out and discovery cannot be conducted. The Commission believes that the language of Duke's Condition No. 7(b) is clear and unambiguous and that it requires the advance notice to be filed with the Commission before a contract is signed. However, if anyone wishes to argue that there is some ambiguity in this language, then the language must be interpreted in light of the Commission's intent at the time it was adopted.

Duke's Condition No. 7(b) was adopted in March 2006, just a few months after the conclusion of the Commission's Docket E-100, Sub 85A proceeding, and this

[3] Actually, PEC's present advance notice condition, Condition No. 57b, is similar to Duke's, i.e., it requires notice to be filed "before granting native load priority." PEC's original advance notice condition from its Docket No. E-2, Sub 760 proceeding back in 2000 required notice "in advance of such a contract being executed," but this condition was rewritten as part of PEC's Docket No. E-2, Sub 844 proceeding in 2004.

proceeding provides the appropriate historical context for determining the Commission's intent. Early on, in one of its first advance notice proceedings, Progress questioned whether the Commission could ever actually prohibit a utility from entering into a wholesale contract due to the federal jurisdiction over wholesale sales. In response, on March 11, 2002, the Commission initiated a generic investigation in Docket No. E-100, Sub 85A, to consider the jurisdictional issues raised by advance notice proceedings. The Commission asked the parties to address a number of issues, including how the Commission's jurisdiction complements or conflicts with FERC's jurisdiction with respect to wholesale contracts at native load priority. Other interested parties, including Duke, participated in this Sub 85A investigation.

The Commission issued its Order Regarding Jurisdiction in Sub 85A on July 10, 2002. The Order reads in pertinent part as follows:

> The Commission concludes that it has jurisdiction and authority under State law to review, before they are signed, proposed wholesale contracts by a regulated North Carolina public utility granting native load priority to be supplied from the same plant as retail ratepayers and to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina....

The Commission further concluded that Congress never intended to preempt such State regulation and that such State regulation serves a legitimate State purpose and its effect on interstate commerce is incidental and not excessive when compared to the State interest involved. PEC and Duke moved for reconsideration, arguing that federal jurisdiction over wholesale activities is always present. The Commission denied reconsideration on August 20, 2002, and Duke and PEC appealed.

The Sub 85A appeal took years to resolve, but the Commission's assertion of jurisdiction was upheld. On July 1, 2005, the North Carolina Supreme Court issued an opinion holding that the Federal Power Act and the Supremacy Clause do not preempt the Commission's authority to conduct a "pre-sale review" of a utility's proposed grant of native load priority to a wholesale customer that will be supplied from the same generating plants as retail customers. State ex rel. Utilities Commission v. Carolina Power & Light Company, 359 N.C. 516 (2005). The Supreme Court remanded the case to the Court of Appeals for consideration of other issues. On remand, the Court of Appeals, by an opinion issued December 6, 2005, held that the requirement that utilities allow the Commission to review proposed contracts before they are signed is not overly burdensome on interstate commerce and does not violate the Commerce Clause. State ex rel. Utilities Commission v. Carolina Power & Light Company, 174 N.C.App. 681, 684-85 (2005).

The Commission's Sub 85A orders claimed jurisdiction before a contract is signed, and they were upheld by the North Carolina appellate courts in an appeal that was concluded in December 2005. Duke's Condition No. 7(b) was adopted in March 2006, and it was clearly intended to implement the 2005 appellate decisions. Otherwise,

the entire, four-year Sub 85A proceeding and appeal would have been for naught. There can be no question as to the Commission's intent in adopting Condition No. 7(b).

It has been argued that Duke signed contracts before filing advance notices in two previous dockets (Docket No. E-7, Sub 839 (Piedmont EMC, signed October 22, 2007) and Docket No. E-7, Sub 843 (Blue Ridge EMC, signed December 17, 2007)),[4] and neither the Commission nor the Public Staff objected. We need only state that those proceedings do not bind the Commission or change the wording of the advance notice condition. It may be argued that it would be difficult to time a complex transaction in such a way as to essentially reach a deal but hold off signing while an advance notice proceeding can be conducted. We make two responses. First, Progress has managed to do this in numerous advance notice proceedings; clearly it can be done. Second, Condition No. 59 provides expedited procedures for handling advance notice proceedings.[5] Finally, it might be argued that the conditions precedent render the Agreement sufficiently executory that it can be considered as not yet in effect. Such is not the provision of the conditions precedent. Even if one of the conditions precedent is not satisfied, Duke is obligated to provide native load priority service to Orangeburg for a significant period of time, albeit at a different price.

In conclusion, the Commission holds that Duke's Condition No. 7(b) (and PEC's Condition No. 57b to the extent that it is similarly-worded) requires that an advance notice be filed by Duke no less than 30 days before a wholesale contract is signed, and the Commission directs compliance with this holding in future advance notice proceedings. Such compliance will bring future advance notice proceedings squarely within the holdings of the 2005 Supreme Court and Court of Appeals decisions and will provide for the implementation of the procedures in Condition No. 59 as designed.

DISCUSSION AND CONCLUSIONS AS TO THE ADVANCE NOTICE FILING

The Commission now turns to the present advance notice as to the Orangeburg Agreement. We first note the purpose of advance notice proceedings. When the Commission ordered an advance notice requirement for Progress in 2002, it explained the reason as providing a mechanism to enforce the requirement that retail customers receive priority with respect to, and the benefits from, existing generation and that the utility's wholesale activities not disadvantage retail ratepayers from either a quality of service or rate perspective. See 359 N.C. at 519-20. The North Carolina Supreme Court has stated that such advance notice review "is necessary to enable [the Commission] to fulfill its obligations under the North Carolina Public Utilities Act by ensuring that a regulated public utility has sufficient generating resources to provide reliable and adequate service to its captive retail ratepayers." 359 N.C. at 529.

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[4] These were uncontested proceedings. But for the fact that each contract included load normally served by the EMC's Catawba entitlement, Duke's Condition No. 7(a) would have applied and no advance notice would have been required.

[5] It is unfortunate that the present proceeding has become protracted, but this is an unusual and seminal case. Other advance notice proceedings have been handled more quickly.

In this case, certain parties have raised reliability concerns as to the Orangeburg Agreement. For example, the Public Staff argues that Duke is proposing to voluntarily obligate itself to provide Orangeburg the same rights to system resources as captive retail customers, and thereby increase its loads, its need for new capacity, and its costs and that Duke is doing all of this at the same time that Senate Bill 3 is requiring its retail customers to pay for renewable energy and energy efficiency. CIGFUR expresses similar concerns as to reliability. NCWARN argues that the public convenience and necessity is not served by using energy efficiency gains in North Carolina to support wholesale sales or by building new generating plants for wholesale sales. Duke responds that serving Orangeburg at native load priority will not affect the reliability of service to Duke's retail customers and that Duke has planned for additional wholesale load in its IRP process.

The Commission has carefully considered both the reliability concerns raised by the Public Staff, CIGFUR, and NCWARN and the federal preemption issue posed by the Orangeburg Agreement. After weighing and balancing all of these considerations, the Commission concludes that Duke may proceed with the Orangeburg Agreement at its own risk subject to the following decision as to Duke's Conditions Nos. 5 and 6 and subject to the declaratory ruling on retail ratemaking hereinafter given in this Order.

Duke's advance notice gives (1) notice of its intent to grant native load priority and (2) notice "to treat the retail native load of Orangeburg as if it is the Company's native load under Regulatory Condition Nos. 5 and 6." In the Agreement, Duke has contractually obligated itself to provide service to Orangeburg in a manner as firm as service to Duke's native load, and the Commission will allow Duke to proceed with the Agreement. The Agreement does not specifically refer to Conditions Nos. 5 and 6 or incorporate them into its provisions, however. These conditions are designed to give certain benefits to those Duke customers who have been on-system for years and have contributed to paying for the present system facilities.[6] The conditions provide for Duke to pursue least cost integrated resource planning for its retail native load customers; for Duke to plan and dispatch both system and purchased resources so as to ensure that retail native load customers receive the benefits of those resources, including priority of service; and for Duke to serve its retail native load customers with the lowest-cost power it can reasonably generate or purchase before making power available to customers who are not retail native load customers. The phrase "Retail Native Load Customers" refers to the captive retail customers that Duke is obligated to serve under North Carolina law. Additionally, Condition No. 7(a) provides that the retail native loads of certain named historically served wholesale customers of Duke are considered as retail native load customers for purposes of Conditions Nos. 5 and 6. Orangeburg is not one of these historically served wholesale customers. The Commission believes that the benefits provided by Conditions Nos. 5 and 6 are legitimate and permissible means of reflecting the system contributions that retail native load customers have made over time. These customers have essentially paid for the existing Duke system facilities, and

[6] Progress has similar conditions (now numbered 55 and 56 in the October 27, 2004 Order Adopting Revised Regulatory Conditions and Code of Conduct in Docket No. E-2, Sub 844).

these conditions give them certain benefits as to that system in terms of planning, dispatch, and retail rates – all of which are matters traditionally left to State regulation.[7]

Several parties object to Duke's request to treat the retail native load of Orangeburg as Duke's native load under Conditions Nos. 5 and 6. Some essentially argue that if all customers are given preferred treatment, then no customer will be given preferred treatment and the intent of Conditions Nos. 5 and 6 will be defeated. The Public Staff argues, "The Commission should rule that Duke cannot include Orangeburg's load in its resource planning.... This is necessary to reduce the likelihood that Duke can successfully argue in the future that its inclusion of Orangeburg in its planning process entitles it to charge Orangeburg average system costs and flow the resulting increased costs to its retail ratepayers." The Commission faced a similar issue in a Progress advance notice proceeding in 2003. At that time, the benefits of Progress's comparable regulatory conditions (then numbered 19 and 20) had not been extended to historically served wholesale customers, as they have now. In the 2003 advance notice proceeding in Docket No. E-2, Sub 820, Progress asked to treat the proposed new wholesale load as PEC's retail load for purposes of its Conditions Nos. 19 and 20. The Commission denied the request as follows:

> Conditions 19 and 20 guarantee certain advantages to CP&L's retail native load....[S]hould the present wholesale contract increase average fuel costs in a future annual fuel cost proceeding, and should the Commission want to protect retail ratepayers by reallocating fuel costs between retail and wholesale and reducing the amount recovered from retail, CP&L might argue that Conditions 19 and 20 preclude the Commission from doing so. Therefore, in order to preserve the "no disadvantage to retail" policy, the proposed contract ... must be excepted from Conditions 19 and 20.

93rd Report of NCUC Orders and Decisions 457, at 464 (Order on 20-Day Notice issued February 14, 2003, in Docket No. E-2, Sub 820). In this case, the Commission concludes that in order to preserve the intent of, and the policies embodied in, Conditions Nos. 5 and 6, the Commission must deny Duke's request to treat the retail native load of Orangeburg as if it were Duke's retail native load under Conditions Nos. 5 and 6.

In conclusion, as to the advance notice, Duke may proceed with the Orangeburg Agreement at its own risk subject to the declaratory ruling regarding retail ratemaking hereinafter given in this Order but Duke may not treat the retail native load of Orangeburg as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6. The Commission will not provide to the retail native load of Orangeburg the additional benefits that Duke's Conditions Nos. 5 and 6 provide to its retail and historically served wholesale customers, i.e., Duke's obligation to pursue least cost

[7] For example, FERC has recognized, in the context of an RTO, that a State commission may require a public utility to sell its lowest cost power to its retail native load customers. New PJM Companies, 105 FERC ¶ 61,251 (2003).

integrated resource planning and responsibility for resource adequacy; the benefits, including priority of service, of the planning and dispatch of Duke system generation and purchased power resources; and the right to "the lowest-cost power" that Duke can reasonably generate or purchase.

DISCUSSION AND CONCLUSIONS AS TO THE DECLARATORY RULING REQUEST

Our next consideration is the Joint Petition for Declaratory Ruling filed by Duke and Orangeburg. The requested relief was expanded and refined at the oral argument and in their joint proposed order. Duke and Orangeburg now request a ruling as follows: "For all native load priority wholesale contracts entered into subsequent to March 24, 2006, with terms of five years or more for customers located in North Carolina or South Carolina and priced at system average costs, the Commission shall allocate revenues from such contracts to wholesale jurisdiction and the allocation of wholesale costs to wholesale jurisdiction with respect to such contracts will be based on system average, or embedded, costs." Although Duke and Orangeburg request a ruling applicable to all utilities under the Commission's jurisdiction, Progress opposes the request. Indeed, Progress argues that the Commission should declare that the costs of the Orangeburg Agreement will be allocated on an incremental basis.

Numerous issues have been raised as to the Joint Petition. Several intervenors have challenged the procedure being employed by Duke. These parties assert that, although the Commission has authority to issue rulings declaring rights and legal relations within its jurisdiction (see G.S. 1-253, et seq., and G.S. 62-60), a declaratory ruling is not appropriate in these circumstances. They make various arguments: the Commission should not pre-determine ratemaking treatments outside rate cases where all relevant factors can be considered, there is no "actual controversy" here in the declaratory judgment sense of the term, there is no uncertainty to be resolved since the Commission has made clear rulings in the regulatory conditions that have been ordered for both Duke and Progress, Duke is really making a collateral attack on its regulatory conditions, and the appropriate procedure would be a request for reconsideration under G.S. 62-80 instead of a declaratory ruling. A series of constitutional issues have been raised by Duke and Orangeburg. They argue that, due to the federal jurisdiction over wholesale sales, the Commission could not constitutionally allocate wholesale revenues and costs for retail ratemaking purposes in any manner other than as requested in their Joint Petition.[8] A third set of issues was raised by the testimony, much of which was intended to show that wholesale sales benefit retail customers and, indeed, all of North and South Carolina. The argument is that the Commission should issue the requested declaratory ruling in order to promote the wholesale power market, which will in turn produce these benefits. The Commission has considered all of these issues.

[8] It is worth noting that, although Duke argues that the Commission would be preempted from upsetting the cost allocation agreed to by the parties in their Agreement, Duke did not rely upon this proposition in its negotiations with Orangeburg. Duke saw fit to negotiate (and Orangeburg saw fit to accept) conditions that protect Duke in the event the Commission does what Duke argues the Commission cannot do, i.e., to allocate wholesale costs for retail ratemaking in a manner not based on system average.

I.

The Commission finds merit in some of the arguments questioning the propriety of a declaratory ruling. As the Commission has ruled before, a declaratory ruling should not be used as a substitute for another proceeding that must be filed in the future.[9] The Commission has also previously noted the difficulty of trying to make ratemaking decisions as to wholesale contracts in an advance notice proceeding,[10] and the evidence here emphasizes that problem: in the course of this proceeding, Duke's estimate of the impact of the Orangeburg load on its North Carolina retail cost of service increased from 0.01¢/kWh (or approximately $6 million), to 0.022¢/kWh (or approximately $13 million), to 0.024¢/kWh (or approximately $14 million). The Commission cannot know what the evidence might be at the time a rate case or fuel case is ready for decision, and such a decision will have to be based upon the evidence presented at that time. The Commission also notes that reconsideration, not a declaratory ruling, was the procedure invoked when Progress asked to revise its regulatory conditions in Docket No. E-2, Sub 844. On the other hand, Duke contends that a declaratory ruling is appropriate since it is actively pursuing additional new wholesale customers in North and South Carolina, its regulatory conditions have introduced uncertainties that are inhibiting the negotiation of such contracts, and a declaratory ruling can resolve these uncertainties and stabilize Duke's relationships with Orangeburg and other wholesale customers.

The Commission has considered all of these arguments. The Commission recognizes that it has on a few occasions in the past given declaratory rulings in circumstances which might not have supported such in a very strict sense. Most notably, in Docket No. E-7, Sub 819, the Commission issued a "declaratory ruling in the form of a policy statement" giving Duke general assurance that certain planning activities in assessing the development of a proposed nuclear station were appropriate. See Order Issuing Declaratory Ruling issued March 20, 2007, in Docket No. E-7, Sub 819. In this same spirit, the Commission has concluded that, although it will not issue any declaratory ruling that purports to revise Duke's regulatory conditions or to apply to contracts beyond this docket, the Commission will give Duke and Orangeburg a declaratory ruling or policy statement regarding retail ratemaking applicable to this docket and to this Agreement, and based upon the present evidentiary record.

The Commission emphasizes two important qualifications. First, the present Commission cannot bind future Commissioners making ratemaking decisions in particular cases. Both Duke and Orangeburg have conceded as much. To the extent Duke seeks to alleviate uncertainty, the present order gives as much certainty as the Commission can provide in the present circumstances. Second, Duke's Condition No.

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[9] "Anticipatory rulings are not favored, and the Commission does not believe that it is appropriate to issue a declaratory ruling as to how the Commission will rule in a future proceeding." Order on Affiliate Contracts issued August 20, 2003, in Docket No. E-7, Sub 728.

[10] "Aside from the fact that the relevant provisions of the Public Utilities Act require that all ratemaking adjustments be based on actual and not projected figures, we are completely uncomfortable with the proposition that we can put ourselves in a position to make appropriate ratemaking adjustments for the period from 2007 until 2009 at the present time [which was 2003]." 93rd Report of NCUC Orders and Decisions 457, at 468 (Order on 20-Day Notice issued February 14, 2003, in Docket No. E-2, Sub 820).

7(d)(i) specifically provides, "The Commission retains the right to assign, allocate, and make pro-forma adjustments with respect to the revenues and costs associated with Duke Power's wholesale contracts for both retail ratemaking and regulatory accounting and reporting purposes." Reconsideration under G.S. 62-80 would be the appropriate remedy to revise this regulatory condition, but Duke has not asked for reconsideration and the procedures for reconsideration have not been followed herein. The present order therefore does not purport to reconsider any prior Commission decision or to revise any of Duke's regulatory conditions.

The Commission's ruling or policy statement is as follows: In any future retail ratemaking proceeding, the Commission should allocate the wholesale revenues and costs of the Orangeburg Agreement in the manner that produces the lowest cost power and just and reasonable rates for Duke's retail native load customers. Any such decision will be made on the basis of the evidence presented in that future proceeding. On the basis of the evidence presented herein, it would be appropriate to allocate revenues from the Orangeburg Agreement to wholesale jurisdiction and to allocate wholesale costs to wholesale jurisdiction based upon incremental costs in any future retail ratemaking proceeding. The Commission concludes that it would not be preempted by federal law from allocating wholesale revenues and costs in such a manner for retail ratemaking purposes, and the Commission concludes that such allocation is consistent with Duke's regulatory conditions, is consistent with the Commission's statutory responsibilities, and is supported by the testimony. The Commission will now discuss the reasons for these conclusions.

II.

The federal preemption arguments decided in the 2005 Supreme Court and Court of Appeals decisions in the Docket No. E-100, Sub 85A appeal concerned the Commission's authority to conduct advance notice proceedings before a contract is signed; the present ruling focuses on the Commission's authority to allocate the revenues and costs associated with a wholesale contract in a general rate case or fuel case heard after a contract has been put into effect. This ruling presents different federal preemption issues, but the same areas of the law are involved: the filed rate doctrine and the reach of the Commerce Clause and the Equal Protection Clause.

The filed rate doctrine essentially holds "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Nantahala Power and Light v. Thornburg, 476 U.S. 953, 963 (1986) (emphasis added). The Orangeburg Agreement was negotiated pursuant to a "market-based" tariff that Duke has filed with FERC. As the Commission understands the FERC market-based tariff scheme, FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, that it lacks the capacity to erect other barriers to entry, and that it has avoided giving preferences to its affiliates. Such a tariff, instead of setting forth rates, simply allows the utility to enter into freely negotiated contracts with purchasers. FERC does not require that these negotiated contracts be filed before going into effect; FERC instead requires

quarterly reports summarizing the contracts and ongoing demonstrations that the utility still lacks or has adequately mitigated market power. See Morgan Stanley v. Public Utility District No. 1, --- U.S. ---, 128 S.Ct. 2733 (2008). The testimony at the hearing confirms that the Orangeburg Agreement has not been filed with FERC. Some parties argue that the Agreement has therefore not been "filed or fixed" by FERC and that the filed rate doctrine does not apply here. Orangeburg, on the other hand, argues that the Agreement is a "filed rate" for purposes of preemption pursuant to the filed rate doctrine. The Commission is not aware of any court decision specifically preempting State action in the context of a FERC market-based tariff. However, even if we assume that the Orangeburg Agreement is a "filed rate," see California ex rel. Lockyer v. FERC, 383 F.3d 1006 (C.A. 9 2004), that does not decide the federal preemption issue.

The Commission concludes that it is not preempted as to the present order because the ratemaking ruling in this order gives full and binding effect to the Agreement. The ruling herein concerns retail ratemaking – for retail ratemaking purposes in an appropriate future proceeding, based upon the present evidence, the Commission should allocate wholesale costs of the Agreement based upon incremental costs. Such a retail ratemaking decision would not alter any of the terms or conditions of the Agreement, and neither would it overrule or second-guess any FERC decision finding the Agreement to be just and reasonable. In fact, the Agreement provides for just such a decision by its own conditions. The terms of the Agreement demonstrate that the parties thereto were aware of Duke's regulatory conditions and aware that the Commission might make the very decision that we foreshadow today. Duke negotiated contract conditions in anticipation of such a decision, and Orangeburg agreed to the conditions. To the extent that the present order or a future ratemaking decision might lead Duke to invoke, or to try to invoke, any of the conditions changing the contract pricing and term, Orangeburg accepted this risk when it entered the Agreement. This ruling therefore gives Orangeburg the full benefit of the bargain that it struck with Duke. The present ruling does not create any obstacle to federal policy. It does not prevent Duke from negotiating additional wholesale contracts pursuant to its FERC market-based tariff. The Commission believes that this ruling may actually tend to encourage wholesale competition by leveling the playing field for new IPPs that might wish to enter the wholesale market but could not compete with an established public utility offering prices based on system average costs. The Commission therefore concludes that this order is not subject to federal preemption by the filed-rate doctrine.

As to the Commerce Clause arguments, the modern trend is to look to the nature of the State regulation involved, the objective of the State, and the effect of the regulation upon the national interest in commerce. This modern approach gives more latitude to State regulation. Arkansas Elec. Co-op. v. Arkansas Pub. Ser. Comm'n, 461 U.S. 375, 390 (1983) (This approach "recognizes, as Attleboro [273 U.S. 83 (1927)] did not, that there is an 'infinite variety of cases, in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.'").

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

In North Carolina, the General Assembly has declared it the policy of the State to promote the "inherent advantage of regulated public utilities," G.S. 62-2(a)(2); to require planning and the fixing of rates to achieve least cost service, G.S. 62-2(a)(3a); and to provide for just and reasonable retail rates, G.S. 62-2(a)(4); and the General Assembly has charged this Commission with carrying out these policies. The Commission's authority to set retail rates is recognized. Arkansas Elec. Co-op., 461 U.S. at 395 ("[T]he national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States."). In setting retail rates, the Commission necessarily must allocate costs of wholesale contacts where, as here, the wholesale load will be supplied from the same generating plant as retail customers. The question therefore becomes whether the Commission would impose an impermissible burden on interstate commerce by deciding to allocate the costs of the Orangeburg Agreement on an incremental basis. Assuming that such a decision would impose some burden, the Commission believes that the burden on interstate commerce would be incidental and clearly outweighed by the importance of the legitimate and vital State interests being served by this Commission's retail ratemaking authority. See generally, Arkansas Elec. Co-op. and General Motors Corp. v. Tracy, 519 U.S. 278 (1997).

Finally, Duke and Orangeburg make a preemption argument based upon equal protection. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike....[State legislation] is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest....When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude...." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985). In areas of economic policy, a classification "that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenges if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Federal Communications Comm. v. Beach Communications, 508 U.S. 307, 313 (1993).

Duke has been providing electric service to retail customers in North Carolina since 1924, and it has served the historic, in-control-area wholesale customers identified in its regulatory conditions for decades. Together, these customers have paid for Duke's present system facilities. Neither Orangeburg nor its retail customers have

ever been served by Duke, and they have not contributed to existing Duke plant. Duke has a statutory obligation to serve all retail customers who require electric service within its North Carolina franchised service area. Even under the FERC market-based tariff scheme, Duke has no obligation to serve Orangeburg or its retail customers, and Orangeburg has no statutory or constitutional right to service from Duke. Duke's retail and historically served wholesale customers are not similarly situated to Orangeburg, and there are ample rational bases for distinguishing them for equal protection purposes.

Even if one of these federal preemption arguments should ultimately prove successful, Duke's Condition No. 14, which was adopted to cover such an eventuality, provides that Duke shall "bear the full risk of any preemptive effects of federal law with respect to any contract, transaction, or commitment entered into or made by Duke Power" and that Duke "shall take all actions as may be reasonably necessary and appropriate to hold North Carolina ratepayers harmless from rate increases, foregone opportunities for rate decreases or any other effects of such preemption." Duke specifically agreed to the terms of Condition No. 14 by letter filed March 27, 2006, in the Duke/Cinergy merger proceeding in Docket No. E-7, Sub 795; and the Commission will take such action as necessary to enforce Condition No. 14.

III.

Having concluded that the Commission constitutionally may allocate the wholesale costs of the Agreement on an incremental basis for retail ratemaking purposes, the Commission now turns to why such would be appropriate. Duke had the discretion either to enter into this Agreement or not; Duke does not have such discretion as to its captive retail customers. The Commission believes that the appropriate regulatory policy is to treat the Agreement for retail ratemaking purposes in the way that is best for Duke's North Carolina retail ratepayers. Duke's Condition Nos. 5 and 6, as previously discussed, provide Duke's retail and historically served wholesale customers certain advantages, including the benefits of least cost planning, the benefits of system dispatch, and the lowest-cost power Duke can reasonably generate or purchase from other sources. These conditions reflect a policy that Duke's retail and historically served wholesale customers should not subsidize service to new wholesale customers such as Orangeburg who have never previously been customers and who have not shared in the costs of the existing system facilities. In addition, the Commission has a statutory responsibility to ensure that a public utility provides safe, reliable, and least-cost service at just and reasonable rates to the utility's captive retail ratepayers. G.S. 62-2(a)(3a), 62-30, 62-32, 62-110.1 and 62-131. Given the evidence discussed below, allocating the costs of the Orangeburg Agreement on a system average basis would be contrary to the lowest-cost power requirement of Duke's Conditions Nos. 5 and 6 and to the least-cost and just-and-reasonable-rate responsibilities of this Commission. The Commission must act on the basis of the present evidentiary record in making this ruling. Any future ratemaking decision will of course be based upon the evidence presented in that future proceeding and upon what produces the lowest cost power and just and reasonable rates for retail native load customers.

The testimony demonstrates that a comparison of all of the quantifiable benefits and costs of the Orangeburg Agreement, as they are now known and estimated,[11] results in an increase of $14 million a year in the cost of service to Duke's North Carolina retail ratepayers. See Confidential Revised Shrum Exhibit 1 – Analysis of Impact on NC Retail System Average Generation Cost Due to Additional Load Orangeburg. The $14 million is a "net" number, reflecting both an increase in fuel costs and an allocation of a portion of fixed costs away from retail customers. Retail customers will experience the fuel increase in Duke's annual fuel cost proceedings while the re-allocation of fixed costs will not occur until Duke has a general rate case. Duke asserts that such an increase is de minimis, but the Commission disagrees. Duke did not think the amount de minimis for its own purposes since Duke inserted conditions to convert the Agreement to incremental-cost-based rates if the Commission rejects the use of system average cost accounting.

Duke argues that wholesale sales provide numerous benefits to offset the costs of the Agreement, but these alleged benefits were not -- and cannot be – quantified, and there is therefore no evidence that unquantifiable benefits will outweigh the quantified monetary impact. In the context of the Orangeburg Agreement, many of these alleged unquantifiable benefits provide no benefit, or only incidental benefit. For example, Duke says that wholesale sales can support economies of scale in building new plant, but the generating plants that Duke now plans to build were certificated or announced before the Agreement was signed; the Agreement could not have figured into the planning for these plants. Further, the Commission recently rejected a similar argument in the Cliffside certificate order, observing that "[e]conomies of scale, in and of themselves, do not establish a need for the capacity...." Order Granting Certificate of Public Convenience and Necessity with Conditions issued March 21, 2007, in Docket No. E-7, Sub 790. Duke says that wholesale sales benefit retail ratepayers by reducing the "lumpiness" of new plant additions. Lumpiness refers to the fact that generation is often added in blocks of capacity that exceed the utility's load growth from year to year, and, thus, the utility's reserve margin may exceed targets for a time. Lumpiness is a factor of many things, including the amount of capacity added, the reserve margin before the addition, and the utility's other load growth. Lumpiness is a fairly short-term problem, until the utility's load grows into the new capacity. There is no evidence that the Orangeburg Agreement will reduce lumpiness or that any such reduction would significantly offset the monetary impact of the Agreement. Any contribution that the Orangeburg Agreement might make toward reducing any lumpiness that might arise during its term is speculative and incidental, and this argument does not justify entering into the ten-year Agreement.

[11] The Commission is mindful of the testimony as to the methodology used to produce this calculation. The Public Staff characterized it as a rough estimate or "quick and dirty." Duke witness Shrum described it as a simple but logical way to assess the impact of adding incremental load; she thought that it may overstate the impact by assuming that new generation would be needed immediately, but she admitted that any other approach would require many assumptions about the future.

Duke argues that wholesale customers can help shoulder the burden of new plants, including its new plants under construction or being considered (the Cliffside coal plant, the Dan River and Buck combined cycle plants, and the Lee nuclear station). That is possible, depending upon the timing of general rate cases and the completion dates of the plants, but, in any event, the contributions from the Agreement will be of relatively short duration compared to the useful lives of such new plants. However, the issue here is to determine how the costs of the Agreement will be shouldered for retail ratemaking purposes. On this record, the Commission believes that the wholesale costs of the Agreement should be allocated on an incremental, rather than system average, basis in order for Orangeburg to pay its appropriate share of the cost of fuel and plant.

Duke says that wholesale sales at average system cost pricing incent it to reduce costs, but the Commission reminds Duke that it already has an obligation under Condition No. 6 to serve its retail customers with the lowest-cost power it can reasonably generate or purchase and an obligation under G.S. 62-131(b) to provide adequate, efficient, and reasonable retail service. Duke has a responsibility and an incentive to lower its costs whether it provides service in the competitive wholesale market based upon system average costs or otherwise.

Duke says that its ability to compete for new wholesale load would be "greatly diminished" if the Commission allocates wholesale contracts on an incremental basis. Orangeburg and others expressed concern that municipalities and coops may become captive to their current on-system wholesale suppliers. The Commission rejects these arguments. The testimony shows that Duke's only competitor for the Orangeburg Agreement did not price its proposal on a system average basis, as did Duke. Allocating the wholesale costs of the Agreement on an incremental basis will not prevent Duke from competing for other such contracts in the future. Instead, given the evidence herein, allocating the costs of such wholesale contracts on an incremental basis will simply mean that a competitive advantage that Duke sought to enjoy in the wholesale market, subsidized and financed by its retail customers, will not be assured.

Duke and Orangeburg repeatedly ask that the Agreement be afforded "traditional" ratemaking treatment. In effect, Orangeburg is asking to be treated as if it had been part of Duke's system all along, just like Duke's captive North Carolina retail customers and its historically served wholesale customers. But Orangeburg is outside of Duke's control area and has never been on Duke's system before, and it is even now unwilling to commit to be a Duke customer for more than the term of the Agreement. Orangeburg tries to equate its ten-year commitment, with no obligation to renew and no stranded cost obligation if it does not renew, with the situation of captive retail customers who have no other service provider and the situation of historically served wholesale customers who have been on-system for decades and who can renew their contracts without any notice to the Commission. The situations are clearly not comparable.

Duke witness Rose testified that the standard procedure for dividing costs between wholesale and retail is on the basis of system average costs, but that the predicate for such allocation is that the utility be able to plan for the wholesale load consistent with the way it plans for retail load. He testified that such planning requires a wholesale contract of "sufficient duration and firmness" that the planner can meaningfully rely on the customer for resource planning purposes, and he argued that the ten-year Agreement is of such duration. He conceded, "If you knew for a fact that you couldn't plan for this load then it would, under FERC rules, not be subject to sort of average cost principles." The Commission notes that the Agreement will end in 2018 while the plants now under construction or being planned will not come online until 2012 or 2018 or later. These plants will have useful lives of 35 or 40 years. The Agreement specifically provides that Duke "does not commit, and shall not be deemed to have committed, to plan its system to be able to provide any service to Orangeburg beyond the Term..." Further, given Condition No. 7(b), Duke clearly could not plan for the Orangeburg load consistent with the way it plans for retail load because new load such as Orangeburg must be reviewed by the Commission and the intent of Condition No. 7(b) is that Duke will serve such load only to the extent authorized by the Commission. Given these facts, the Commission does not believe that witness Rose's testimony supports system average cost allocation for this Agreement.

Duke makes much of the fact that it has included undesignated wholesale load in its IRPs "for planning purposes," so as to essentially argue that it has planned for the Orangeburg contract. But Duke's 2007 Annual Plan included only 100 MW of undesignated wholesale load beginning in 2010, less than the Orangeburg load beginning in 2009. The undesignated wholesale load in Duke's IRPs must be viewed in light of the fact that Duke's historically served wholesale customers can renew their contracts, with growth or additional requirements, without any notice to the Commission while contracts with wholesale customers such as Orangeburg must be filed for Commission review under Duke's regulatory conditions. Further, this undesignated load was included in the IRPs as "representative of potential future wholesale load," and witness Hager testified that Duke "can always make adjustments to our load forecast as time goes on, as we realize more of that or less of that." By approving Duke's IRPs, the Commission never intended to give advance blessing to a wholesale contract like the present Agreement, and the undesignated wholesale load in Duke's IRPs does not support average system cost allocation for this Agreement.

The Commission notes that Duke's 2008 Annual Plan filed in Docket No. E-100, Sub 118 includes both the load of the Orangeburg Agreement and also undesignated wholesale load of approximately 300 MWs in 2011 and 600 MWs in 2012. Duke witness Hager testified that Duke would adjust its IRP if the relief requested in the present docket is not granted. The Commission directs Duke to file any such revisions to its 2008 Annual Plan within 30 days from the date of this Order, in both this docket and Docket No. E-100, Sub 118. Such revisions should address whether any of the undesignated wholesale load is for sales similar to the Orangeburg Agreement and the effects on Duke's future supply and generation requirements as currently shown.

The ruling in this order is consistent with past Commission precedents. There have been three outside-control-area, native load priority wholesale contracts considered by the Commission during fuel adjustment cases. As to two of the three (Progress contracts with NCEMC including load in Duke's control area and with Santee Cooper in South Carolina), fuel costs were allocated on an incremental basis. For the third (a Progress contract with Seneca, South Carolina, Docket No. E-2, Sub 798), Progress allocated system average fuel costs, rather than incremental costs; the load involved was small, only 30 MW; no party objected to the proposed allocation; and the matter was not discussed in the Commission's fuel adjustment orders.

This ruling also finds support in a FERC decision. In Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Co., 123 FERC ¶ 61,047 (2008), Southwestern Public Service Company (SPS) entered into wholesale sales contracts with Manitoba Hydro and other customers and allocated system average fuel costs to the sales. Certain existing wholesale customers of SPS (collectively, Golden Spread), whose contracts had been allocated system average fuel costs, complained to FERC. FERC held in favor of Golden Spread, ruling that the fuel cost allocation for the new contracts had to be on an incremental basis rather than a system average basis. FERC stated,

> In this case, the Commission must consider the workings of a market-based intersystem sale on a FCAC [fuel cost adjustment clause]. Market-based rate transactions may take many forms: prices can be fixed by the contract, based on an index, or derived by some other formula. By definition, such prices may have no basis in actual cost. Consequently, fuel cost must be imputed for these transactions for purposes of the utility's fuel cost clause.
>
> The Commission finds that because the market-based intersystem transactions do not necessarily have a basis in actual cost, and to avoid the possibility of subsidization of these transactions by the wholesale requirements customers, the Commission must impute an appropriate fuel rate to the fuel cost calculation in order to avoid native load customers overpaying as a result of intersystem transactions under market-based rate contracts. In reaching this conclusion, the Commission recognizes that the FCAC in SPS' cost-based contracts with respect to fuel costs for market-based intersystem sales may not have been entirely clear.
>
> Imputing the incremental cost of fuel to intersystem transactions assures that native load customers pay no more for fuel than they would have paid had the intersystem sale not occurred. To impute something different from incremental costs as a surrogate for the actual fuel cost could allow market-based rate sellers to include an artificially low fuel cost into their market-based rate contracts. Imputing an artificially low fuel cost would result in unjust and unreasonable subsidization of intersystem sales

by requirements customers, which is contrary to the intent of the fuel cost clause.

Attributing incremental fuel cost is consistent with the only market-based rate case that addressed this subsidizing effect. In Entergy Services, Inc., the Commission acknowledged that there is "no requirement [that the utility, when making off-system sales] sell power and energy ... at rates that would recover at least its system incremental costs." But to protect wholesale customers who had FCACs in that case, the Commission ordered Entergy to incorporate a floor into the relevant rate schedule equal to incremental costs incurred to provide the service. The same principles of protecting wholesale requirements customers from an unjust subsidization as applied in Entergy apply here.

....

In the instant proceeding, for market-based rate transactions, SPS' prices are limited by competition in lieu of cost-based regulation. If SPS or any other seller wishes to include a fuel price in its market-based contract, that price may be defined as average (as SPS so defined), indexed, incremental, or in any other manner. The fact that at least some of these contracts were filed with the Commission and accepted for filing is not germane because, as we stress here, the Commission is not seeking to change the contract language regarding fuel costs in market-based contracts, if fuel costs are even addressed at all. The Commission is simply directing here that, in order to avoid subsidization, the incremental cost of fuel for these market-based intersystem sales must be flowed through the FCAC.

Golden Spread, 123 FERC at paragraphs 40-47 (footnotes omitted).

Duke and Orangeburg try to distinguish Golden Spread on the basis that it involved short-term sales, unlike their ten-year Agreement. This argument fails for two reasons. First, in Golden Spread, although FERC sometimes referred to the contracts being challenged as opportunity sales, it was explicit that "[d]uration is not necessarily the determining factor in distinguishing opportunity sales from wholesale requirements sales." Id. at paragraph 39. Second, FERC also referred to the contracts as "market-based intersystem sales," Id. at paragraphs 39 and 47; and in the Initial Decision in the Golden Spread proceeding, the Administrative Law Judge characterized the contracts being challenged as "long-term market-based capacity sales." Golden Spread Electric Cooperative, Inc., et al. v. Southwestern Public Service Co., 115 FERC ¶ 63,043 at paragraphs 132-50 (2006) (discussion of Issue II.A.3). The Commission rejects Duke's and Orangeburg's attempts to distinguish Golden Spread. The length of the contract terms was not crucial in the Golden Spread decision. Rather, the critical consideration for FERC, expressed repeatedly in the above quotation, was "to avoid native load customers overpaying as a result of intersystem transactions under market-based rate

contracts." The Commission concludes that this consideration applies to the present situation, where Duke is obligated to provide its retail native load customers the lowest cost power that it can generate or purchase and the Commission is obligated to ensure least-cost service at just and reasonable retail rates.

In summary, given the evidence presented herein, the Commission concludes that, in order to be consistent with Duke's regulatory conditions and its own statutory responsibilities, the Commission should allocate revenues from the Orangeburg Agreement to wholesale jurisdiction and should allocate wholesale costs to wholesale jurisdiction based upon incremental costs in any future retail ratemaking proceeding. The Commission concludes that this decision is in the best interest of retail ratepayers and is fair to both Duke and Orangeburg, who entered into their negotiations fully aware of Duke's regulatory conditions and this Commission's responsibilities.

IT IS, THEREFORE, ORDERED as follows:

1. That Duke's Condition No. 7(b) requires that an advance notice be filed no less than 30 days before a wholesale contract is signed and Duke shall comply with this holding in future advance notice proceedings;

2. That Duke may proceed with the Orangeburg Agreement at its own risk subject to the retail ratemaking ruling given in this Order, but Duke may not treat the retail native load of Orangeburg as the Company's native load for purposes of Duke's Regulatory Condition Nos. 5 and 6;

3. That, given the evidence presented herein, the Commission should allocate revenues from the Orangeburg Agreement to wholesale jurisdiction and should allocate wholesale costs to wholesale jurisdiction based upon incremental costs in any future retail ratemaking proceeding; and

4. That Duke shall file any appropriate revisions to its 2008 Annual Plan within 30 days from the date of this Order, in both the present docket and Docket No. E-100, Sub 118.

This the 30th day of March, 2009.

NORTH CAROLINA UTILITIES COMMISSION

Patricia Swenson

Patricia Swenson, Deputy Clerk

KC033009.20

Chairman Edward S. Finley, Jr., concurs in part and dissents in part.

DOCKET NO. E-7, SUB 858

Chairman Finley Concurring in Part and Dissenting in Part:

But for the "condition precedent" and "material adverse ruling" provisions of the Duke/Orangeburg PPA, inserted as protection against an adverse ruling by this Commission in the pre-grant review or a subsequent case, the PPA is a wholesale contract granting Orangeburg firm power for 10 years at system average costs. But for the pre-grant review jurisdiction under Commission orders in Docket No. E-100, Sub 85A and the Regulatory Conditions approved in Docket No. E-7, Sub 795, the contract would fall under the exclusive jurisdiction of FERC. Duke and Orangeburg argue that under the Golden Spread test FERC would approve the cost recovery provisions where the rates for the firm power are based on system average costs. Orangeburg commits to take service for 10 years so Duke can plan its generation facilities to serve the Orangeburg load. But for the pre-grant review jurisdiction, any party wishing to challenge the PPA as being harmful to North Carolina ratepayers would have to do so at FERC through a complaint proceeding. While FERC would entertain arguments made by the Public Staff and others that the terms of the PPA are harmful to North Carolina retail ratepayers, FERC would weigh these arguments against those such as arguments Duke, Orangeburg and others make here that to deny or modify the PPA harms Orangeburg and its retail customers more than it helps the North Carolina retail ratepayers and interferes with the intended operation of the wholesale market.

Based on the facts of this contract, should FERC accept the arguments of Orangeburg and its allies, the FERC would approve the PPA without modification. Of course, such a result is why the pre-grant review process established in the Regulatory Conditions is in place.

Duke seeks a generic order with a declaratory ruling that the PPA and similar contracts will pass the pre-grant review test and will not result in an allocation of costs to the wholesale jurisdiction at an incremental or higher than system average cost basis.

The Public Staff and others argue that the PPA harms or threatens reliability to North Carolina retail customers and that if costs are allocated to the wholesale jurisdiction on a system average cost basis, the rate impact on North Carolina ratepayers will be too great. However, the Public Staff does not request a ruling rejecting or modifying the terms of the PPA. Instead, the Public Staff seeks an order saying that if Duke proceeds, it does so at its own risk. Public Staff complains bitterly that Duke has violated Condition 7(b) by signing the PPA before filing it with the NCUC but concludes this argument not by asking that the notification be denied or dismissed but that Duke be instructed not to commit a similar violation in the future. If the Public Staff is correct that Duke has violated the Regulatory Conditions, it would seem the Public Staff would argue that the Commission should reject Duke's notification. After

all, the ostensible purpose of the pre-grant review is to foreclose wholesale contracts that harm North Carolina ratepayers for reliability or rate responsibility reasons. Obviously, if Duke proceeds with the PPA, and gets to the next rate case or fuel case where the PPA costs are at issue, the Public Staff will renew the arguments it makes here then and will seek allocation of costs to the wholesale jurisdiction at incremental costs.

Thus, in this case, we find ourselves in the anomalous situation where Duke, which, except for the Regulatory Conditions, would have entered into the PPA without NCUC involvement, is seeking NCUC rulings approving its terms and where the Public Staff, the proponent for the Regulatory Condition requirements, is advocating that the NCUC rule that Duke proceed at its risk and refrain from issuing a ruling, as contemplated by the Regulatory Conditions, assessing whether the PPA threatens service reliability or rate levels for North Carolina retail ratepayers.

The manner in which the PPA is written suggests that an order from the NCUC instructing Duke to proceed at its own risk or modifying the economic benefits of the PPA will cause Duke to exercise its rights under one of the escape clauses to Orangeburg's detriment.

If the Commission rejects or modifies the PPA now in this docket, Orangeburg has an opportunity to take its negotiated agreement to FERC and ask FERC to enforce it and disregard any NCUC order that interferes. A comparable request was made and granted in Utah v. FERC, 691 F2d. 444 (10th Cir. 1987). Likewise, if Duke proceeds and in the future the NCUC were to allocate costs on the basis of incremental costs, the terms of the PPA are such that for up to 30 months Duke must still sell Orangeburg firm power at system average costs. Thus, the future NCUC order would result in trapped costs in violation of the federal preemption doctrine. Also, Duke's resort to the material adverse ruling escape clause upon such an NCUC ruling potentially results in an early termination of the PPA and leaves Orangeburg well short of its bargained for objectives. Again, this harm allows Orangeburg to go to FERC and complain.

Orangeburg, of course, is not foreclosed from asserting preemption anywhere it wishes, and has every reason to do so. Confronted by arguments of waiver or estoppel, Orangeburg can be anticipated to argue that the U.S. Constitution and controlling federal law provide FERC with exclusive jurisdiction over its transaction with Duke and provisions to which it agreed at Duke's request to comply with NCUC anti-preemptive requirements cannot bar its rights to seek a federal remedy.

Unlike the Sub 85A orders where there was no actual wholesale contract under review that had been modified or rejected, only theoretical interference and the precipitous negative 1.4% reserve margin specter to justify the North Carolina Supreme Court's concerns, here we have an NCUC order denying a very real out of state wholesale customer the benefit of its wholesale contract, with an avenue of recourse to FERC, which, in my view, is likely to take a dim view of efforts of a state jurisdiction to preempt FERC's otherwise preemptive jurisdiction over wholesale transactions in

interstate commerce. FERC likely would view our anti-preemptive efforts much like we have viewed efforts by municipalities to pass ordinances interfering with our jurisdiction over power lines.

In addition to its preemption argument, Orangeburg advances Commerce Clause violation arguments. If the Commission rejects or modifies the PPA or allocates the costs differently so Duke terminates early, the result is a denial by this state of the benefits the South Carolina wholesale customer bargained for in interstate commerce. These facts, according to Orangeburg, are strikingly similar to those in Attleboro, the case that resulted in the Attleboro gap and the passage of the Federal Power Act.

Based on this analysis, the majority's modification of the PPA now or reallocation of costs in the future resulting in early termination of the PPA tees up the scheme under the Regulatory Conditions to protect North Carolina retail ratepayers from FERC jurisdiction to a challenge in FERC. This might explain the anomaly.

Repeatedly, the Public Staff states that in and of itself the PPA has a minor impact on Duke's reserve margin. Also, in and of itself, the impact on retail rates is not significant. The greater concern of the Public Staff is the cumulative impact from a number of similar contracts.

I must say that I think the pre-grant review scheme is not the appropriate way to protect North Carolina retail ratepayers and is prohibited by federal law although adopted for a laudable objective. However, to protect this scheme in this case I would not deny or modify the PPA or disregard the system average allocation of costs as called for in the PPA now or in the future.

Rather, I would tentatively and conditionally, for reasons set forth below, pass this contract and perhaps the smaller load Greenwood PPA and attempt to do so while saying that the next one will not receive such favorable treatment. Another reason for this is that Fayetteville PWC looms on the horizon. I do not believe the Commission should find itself in the position of rejecting a Duke/Fayetteville PWC PPA negotiated on system average costs that will substantially reduce PWC's costs over a Progress/ Fayetteville PWC PPA based on incremental costs. FERC is the better agency to address an issue such as that should it arise.

An initial issue between Duke and the Public Staff is whether Duke violated the terms of Regulatory Condition 7(b) by signing the contract with Orangeburg before providing the 30 days' advance notice required for the Commission's review and if so, whether the Commission should follow the Public Staff's recommendation and decline to approve or disapprove the PPA but instead respond that Duke, should it proceed to implement the PPA, does so at its own risk. The sentence at issue is "before granting native load priority to a wholesale customer . . ., Duke Power must provide 30 days' advance notice of its intent to grant native load priority and to treat the retail native load of a proposed wholesale customer as if it were Duke Power's retail native load pursuant to Regulatory Condition Nos. 5 and 6."

One pertinent phase is "before granting native load priority." The Public Staff cites the lengthy history of the Commission's efforts subsequent to FERC Order 888 beginning with its order in Docket No. E-2, Sub 733 in 2000 to protect its jurisdiction from federal preemption through circumscribing the ability of Duke and Progress to enter into contracts with wholesale customers as evidence that this phrase means that Duke must not sign wholesale contracts before submitting them to the Commission for review. The Public Staff cites for example language in Progress orders preventing contract "execution" before submission for Commission review, the proceedings in Docket No. E-100, Sub 85A establishing the Commission's legal authority to impose such requirements, a number of Commission statements strongly suggesting the Commission's intent to review contracts before they are signed and Commission statements that Duke's regulatory conditions are to be interpreted and construed as Progress' comparable conditions forbidding prefiling execution have been construed.

In response, Duke argues that the phase "before granting" is different than "before execution" or "before signing," and that the language in condition 7(b) is not "substantially the same as" any comparable language in the comparable Progress conditions. A primary argument Duke advances, however, focuses on the phase "to treat the retail native load of a proposed wholesale customer as if it were [Duke's] retail native load pursuant to Regulatory Condition Nos. 5 and 6." Duke argues that § 3.1 of the PPA contains a "condition precedent" that enables Duke to escape any obligation to provide power to Orangeburg at system average costs should the Commission in this docket issue an order that prevents Duke from charging system average costs. Duke argues that its commitment to Orangeburg, therefore, is inferior to the commitment to Duke's native load retail customers.

The Public Staff's concern that Duke not execute or sign a wholesale contract before Commission review, assessment and ruling is that upon signing or execution of a wholesale contract the contract becomes a FERC-filed rate, and, as a consequence, in setting retail rates for Duke, this Commission must avoid trapping costs FERC has approved or permitted Duke to incur pursuant to the FERC-filed rate.

As Orangeburg is outside of Duke's balancing authority, Duke can enter into a wholesale contract with Orangeburg that need not be filed with FERC. Nevertheless, the contract, when executed, becomes a part of Duke's market based tariff, which FERC has approved and the contract's terms upon such execution become a FERC-filed rate. If the terms of the contract obligated Duke to serve Orangeburg at system average costs without reference to any ability of this Commission to object and without an ability of Duke to avoid its obligation to sell power to Orangeburg at system average costs, the harm the Regulatory Condition 7(b) addresses could be present. This harm is what is commonly referred to as "trapped costs".

In my view, Duke's execution of the PPA prior to submitting it for Commission review does not so violate the intent of Regulatory Condition 7(b) as to justify a refusal to address the notification and provide Duke some of the guidance it requests. The

PPA contains a condition precedent provision that circumscribes Duke's obligation to Orangeburg should the Commission determine upon its review in this docket that the PPA jeopardizes or threatens service to Duke's retail ratepayers. The primary purpose of the pertinent Regulatory Conditions in general and 7(b) in particular is to safeguard service reliability to retail customers. Service reliability was the issue in Progress dockets initially giving rise to efforts to impose protection against FERC's preemptive jurisdiction. The N.C. Supreme Court majority opinion upholding such protection in Carolina Power & Light is justified solely on grounds of protecting service reliability, not on the basis of insulating retail ratepayers from FERC approved costs. The concept of pre- signing, pre-execution or pre-grant review, after all, is to enable the Commission to determine if making capacity available from Duke's generating resources to wholesale customers places North Carolina retail customers at risk and to foreclose the risk before the commitment becomes irreversible. The condition precedent preserves those protections.

The condition precedent and material adverse ruling provisions of the PPA do not preclude grants of firm power to Orangeburg altogether upon an adverse Commission ruling. However, any such grants are for not greater than a number of months.

From a service reliability perspective, Duke's commitment to Orangeburg is sufficiently circumscribed so as to negate any harm that might otherwise arise from Duke's signing the contract prior to submitting it to the Commission for review pursuant to Condition 7(b). First, any commitment of firm service to Orangeburg should the Commission reject or materially modify the PPA in advance lasts for no greater than 30 months. Commitment of 200 MW for a maximum of 30 months is insufficient to jeopardize service reliability to Duke's retail customers. Duke acknowledges that it will not serve customers not listed as entitled to service in Regulatory Condition 7(a) at native load priority without authorization of the Commission and that Duke will not treat customers like Orangeburg in its system planning process without making a distinction between wholesale and retail unless the Commission permits. Duke represents that it will not add generation to serve Orangeburg even if the Commission authorizes Duke to proceed with the PPA without modification. The Public Staff argues that the full nine year nine month term of the PPA is insufficient to justify Duke's planning its generation resources to serve the Orangeburg load so as to justify native load priority due in part to Orangeburg's ability to terminate on short notice and avoid sunk cost responsibility. This argument is difficult to reconcile with the Public Staff's argument that Duke's signing of the PPA before submission with a maximum contingent commitment of firm service of 30 months places the Commission in an untenable position.

As discussed above, the whole notion of pre-grant review is to enable the Commission to say "no" to wholesale arrangements that jeopardize retail service reliability. For the Commission to respond to Duke's petition by saying "Proceed at your own risk", would be to avoid the very opportunity the regulatory conditions were formulated to provide.

When the PPA is reviewed from the perspective of retail rates, which after all seems to be the Public Staff's primary concern, a Commission ruling now allocating costs Duke incurs in serving Orangeburg, should the PPA become effective, on the basis of Duke's incremental costs for North Carolina retail ratemaking purposes will not result in trapped costs under the filed rate doctrine. Company witness Svrcek testified that if the Commission were to rule prior to commencement of service to Orangeburg not to approve the use of system average cost accounting for ratemaking or regulatory accounting and reporting purposes, Duke would be required to provide contingent service for one year—full requirements service of native load priority—at Duke's incremental costs.[1] Based on the terms of the condition precedent provision and the fact that the PPA anticipates and incorporates this Commission's ratemaking decisionmaking authority over retail rates as an essential function of its terms, a Commission order assigning costs to the wholesale jurisdiction incurred to serve Orangeburg at greater than system average costs now or rejecting the PPA will not result in trapped costs under the filed rates doctrine. Consequently, the ratemaking harm the Public Staff seeks to avoid in insisting that the Regulatory Condition 7(b) be interpreted to preclude presubmission signing is not present.

In the past, Duke has filed advance notice pursuant to Regulatory Condition 7(b) relying on signed agreements. (Contracts with Blue Ridge EMC in Docket No. E-7, Sub 843 and Piedmont EMC in Docket No. E-2, Sub 839). These filings were made without Public Staff or Commission objection. If Duke's conduct is violative of Regulatory Condition 7(b)'s intent, as the Public Staff argues, a legitimate question arises as to why this violation was not raised when the first violation occurred.

For purposes of this docket, the fact that Duke signed the PPA before submitting it, instead of, for instance, submitting the fully negotiated PPA unsigned, with an affidavit stating that Duke would have signed but for Condition 7(b) makes no difference because, if the Commission were to reject or modify the PPA, rates or service to retail ratepayers are not jeopardized. In my view, the Majority places entirely too much emphasis on when the document was signed. The determining factor for purposes of federal jurisdiction is that the transaction is a wholesale contract in interstate commerce. Moving the filing date to pre-signing, pre-negotiation or pre-RFP or whatever, does not wrest away FERC's jurisdiction over wholesale power transactions.

The broad relief Duke seeks is a declaratory ruling that grants to wholesale customers even beyond the Orangeburg PPA with commitments of native load priority for five years at system average costs are permissible under the Regulatory Conditions and will not be rejected or modified and will not result in allocations of revenues or costs different than set forth in the contract. I agree with the Majority, with the Public Staff and others that this request is too broad, too general and goes well beyond what is

[1] The situation would be somewhat different if the Commission deferred its ruling on this issue and determined to disapprove system average cost regulatory treatment after the commencement of service. In that event Duke would have the right to terminate the PPA, but would still have the obligation to provide full requirements service to Orangeburg at system average cost for 18 months (and perhaps 12 additional months at a fixed demand rate and an incremental energy rate).

permissible under the Commission's authority to issue declaratory rulings. The commitment in each contract must be examined in the appropriate forum on its own terms for the impact on reserve margin and on retail rates as well as the cumulative effect each contract has when viewed within the context of other wholesale contracts Duke may have previously executed. The Commission's ruling appropriately is limited to the Duke/Orangeburg PPA that is before it in this docket.

As an essential feature of the 7(b) notification, Duke requests a ruling from the Commission that Duke's commitment to Orangeburg in the PPA of firm power initially of 190 MW for an approximately 10 years period at system average costs, is permissible. Duke argues that the existence of the Regulatory Conditions creates uncertainty and hinders Duke's ability to participate effectively as a seller in the wholesale market. Duke argues that the contingent commitment to Orangeburg does not jeopardize reliability of service to Duke's North Carolina retail customers and that the potential impact on rates to these customers is de minimus. The Public Staff, on the other hand, argues that if the Commission approves Duke's commitments in the PPA, service to North Carolina retail ratepayers will be jeopardized. Also, because the potential exists for such adverse impacts on the rates of North Carolina retail ratepayers when and if the Commission addresses the rate impact from the PPA, the Commission should not authorize allocation of costs to Orangeburg on system average costs but instead on incremental costs.

The threshold issue these contentions raise is which standard the Commission should apply. The Public Staff argues that the purpose of the pertinent regulatory conditions is to circumvent the preemptive effect of FERC's jurisdiction so as to protect to the maximum intent possible rates and service reliability to North Carolina retail customers from Duke's participation in the wholesale market and to assure that service is provided to retail customers at the lowest possible costs.

Duke, in contrast, argues that strict compliance with the Public Staff line of thought violates the Supremacy, Commerce and Equal Protection clauses of the U. S. Constitution because it promotes the economic interest of North Carolina retail customers without any consideration of wholesale customers like Orangeburg or the wholesale market from which North Carolina retail customers benefit and which federal, national policy promotes. A logical extension of Duke's argument is that if this Commission, through regulatory conditions, is going to regulate the wholesale contracts otherwise under exclusive FERC jurisdiction, the Commission must not neglect interests that FERC otherwise would weigh, i.e., those of the wholesale customer, Orangeburg, and Orangeburg's retail customers.

In my view the standard the Public Staff advocates and the Majority has applied is too inflexible. Through application of tests that have been applied to date it is permissible to grant the limited relief Duke has requested without jeopardizing service or threatening excessive cost responsibility for retail customers so as to undermine the protections for which the Regulatory Conditions were imposed.

Upon being questioned by Commissioner Joyner as to whether the broad declaratory ruling Duke requests would unlawfully bind a future Commission in the exercise of its ratemaking authority, Duke acknowledged that such may be the case and represented that the Company would be satisfied with a preliminary ruling as a clarification of existing policy to allow Duke greater guidance in conducting its activities in the wholesale market. Stated differently, Duke seeks a nonbinding expression of what this Commission would do in establishing retail rates were it now being called upon to do so based on the facts of the record now before it.

The Public Staff argues persuasively that such a declaratory ruling is ill advised and contrary to precedent. While there is merit in the Public Staff argument, the posture of this case justifies a Commission order complying with Duke's limited request and the Majority acted appropriately in providing guidance. The Regulatory Conditions require Duke to submit wholesale contracts such as the Orangeburg PPA for Commission review and possible rejection or modification. But for the regulatory conditions, Duke would be free to execute and implement such contracts as FERC-filed rates, and those seeking to contest their terms as harmful to North Carolina retail ratepayers would be forced to do so by filing a complaint with FERC. Under the Regulatory Conditions Duke risks not only rejection or modification of the PPA now but a reduction or elimination of the benefits of the PPA in the future through an adverse ruling in a fuel or retail rate case from which Duke has no right to appeal. These rather unusual and somewhat draconian features of the Regulatory Conditions, in my view, justify greater flexibility in providing declaratory statements than would traditionally be the case.

The Public Staff also argues persuasively that the regulatory conditions reserve the right to the Commission to make ratemaking determinations regarding cost allocation with respect to wholesale contracts such as this to future retail rate cases. The Public Staff's reading of the regulatory conditions may be correct. Nevertheless, the language does not use the word "future", define how far into the future any determination must be postponed or require the Commission to postpone any expression of its current views, especially if such expression is made with the understanding that it does not bind the Commission in a future rate case. As the Commission's ratemaking decisions are made pursuant to its legislative authority,[2] do not constitute res adjudicata[3] or even stare decisis[4], the Commission could change this ratemaking aspect of the timing of the implementation of the Regulatory Conditions without resort to the reconsideration process of G.S. 62-80.

The first issue warranting a determination that the Majority does not adequately address or resolve is whether Duke's commitment under the PPA of an initial 190 MW of firm power for approximately 10 years jeopardizes service to North Carolina retail

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[2] State ex. rel. Utilities Commission v. Edmisten, 294 N.C. 598, 242 S.E. 2d 862 (1978) (ratemaking activities of the Utilities Commission are a legislative function).

[3] Id. (only specific questions actually heard and finally determined by the Utilities Commission in its judicial character are res judicata).

[4] State ex. rel., Utilities Commission v. Carolina Utility Customers Ass'n, Inc., 348 N.C. 452, 500 S.E. 2d 693 (1998) (Utilities Commission orders in rate cases are not within the doctrine of stare decisis).

ratepayers. Throughout this case Duke has maintained that it does not and has noted repeatedly that no other party has ever maintained that the commitment jeopardizes service to retail ratepayers. In its post hearing proposed order, the Public Staff asserts that the PPA, if approved, does in fact jeopardize service to retail ratepayers.

The Public Staff argues that by taking on a commitment to serve load such as Orangeburg, Duke is exacerbating its currently expressed intent to add new base load and intermediate capacity. Adding such capacity presents challenges such as the environmental challenge from coal and nuclear generation. The Public Staff cites requirements of S.L. 2007-397 emphasizing renewable generation and energy efficiency as reasons to avoid base load and intermediate capacity where possible. The Public Staff cites difficulties with adding natural gas fueled capacity. The Public Staff concludes its reliability argument by stating:

> A grant of native load priority to Orangeburg in and of itself may cause only a relatively small decrease in reserve margin, but obviously 1,000 MW or the 1,500 MW scenarios studied by Duke (which is the load it has testified it is contemplating adding, if not more) would very significantly impact reserve margins. The Commission cannot consider and rule upon each advance notice in isolation. Whether there are numerous small proposed wholesale contracts or a few large ones, significant potential negative effects on reliability have to be considered. This is especially the case in the contract because, if Orangeburg were treated as inconsequential for reliability purposes, no doubt the next new wholesale customer would argue that not allowing Duke to grant it native load priority service would constitute undue discrimination.

I agree with the Public Staff that adding the Orangeburg load will cause only a relatively small decrease in Duke's reserve margin and that while individual insubstantial wholesale load additions do not threaten reliability, many small additions when viewed in totality may. I disagree with the Public Staff argument, however, that if the Commission approves the PPA, the Commission is thereafter precluded from rejecting the next wholesale contract. The Commission's earlier approval of the Blue Ridge EMC and Piedmont EMC wholesale contracts presents no obstacle to the Public Staff's argument that the Commission should now reject the Orangeburg PPA. I agree with arguments advanced by others that the Commission should assess notifications such as these by examining the cumulative effect on reserve margin. Simply because a wholesale load adds 200 MW to the load Duke must serve when the reserve margin otherwise is high does not preclude the Commission from viewing the addition of a 200 MW load in the future when the reserve margin is low as excessive and as posing a threat to system reliability.

The genesis of the Commission's efforts to circumscribe the vulnerability of the North Carolina retail ratepayers to additional wholesale load is the additional load Progress sought to add in Docket No. E-2, Sub 733. Progress intended to add 1,600

MW of new generation to meet anticipated increased demand of native load wholesale customers SCPSA and NCEMC. Without the added generation Progress' reserve margin would have dropped to negative 1.4%. An appropriate reserve margin was 13%. In comparison, if Duke adds the Orangeburg load, the impact on reserve margin is insignificant, and Duke intends to add no new generation to serve Orangeburg.

In my view, insufficient justification exists in the record before the Commission in this docket to reject or modify the PPA on the basis that to permit the PPA to be implemented jeopardizes service reliability to North Carolina retail ratepayers. Duke's wholesale load percentage at peak has declined from 11.8% in 1991 to 3.9% in 2007. Adding the Orangeburg load only brings this percentage back to 4.9%. I would make this determination however with the caveat that, if and when called upon to review notices for future Duke grants of wholesale power at native load priority, the Commission will assess the cumulative impact of all such grants on Duke's reserve margin. Adding 200 MW of firm load when Duke's reserve margin is 17% is one thing; adding 200 MW in the future bringing the cumulative total to 1,500 MW above the level of wholesale load before the addition of Orangeburg when Duke's reserve margin is lower is another case entirely. Duke concedes that adding 1,500 MW of new wholesale load would require it to add generation capacity. The legality of the pre-grant review scheme was justified by the North Carolina Supreme Court majority on the basis of the need to protect service reliability for North Carolina retail customers. The Commission Majority, however, gives this issue almost no consideration and mentions reserve margin not at all in discussing it.

The second and more difficult issue is whether Duke's commitment to serve Orangeburg under the PPA at system average costs should result in an order preliminarily and tentatively indicating that the Commission in the future will refrain from allocating Duke's costs to serve Orangeburg to the wholesale jurisdiction on the basis of incremental costs in a retail rate case. The Majority has determined that it should not.

Duke argues that the impact of the PPA on retail rates is de minimus. The Public Staff argues that the impact cannot accurately be measured and that even if the impact as calculated by Duke is accurate, an increase in costs from the PPA in the range of $13 million per year on retail rates justifies a rejection of Duke's requested declaratory ruling.

Both Duke and the Public Staff insist that the traditional treatment accorded costs from wholesale contracts supports their positions. Duke argues that the traditional approach has been to allocate costs from wholesale contracts to the wholesale jurisdiction on the basis of system average costs. Duke cites the treatment of Progress' sales to Seneca and to SCPSA and NCEMC. The Public Staff argues that the traditional approach is to allocate costs from such contracts on the basis of incremental costs and also cites the contracts between Progress and SCPSA and NCEMC.

I do not see that there is a traditional or precedential post Order 888 policy. The experience is too sketchy and the results too diverse to form the basis of any consistent pattern.

The parties agree, however, that a test, derived by the Public Staff, for purposes of testing Duke's proposal to serve the proposed wholesale loads of Blue Ridge EMC and Piedmont EMC and the Seneca load for Progress has been used to indicate the impact of such proposals on retail rates. Duke has applied this test to the PPA and testified that the results show an annual increase of costs to be borne by Duke's North Carolina ratepayers of from $6 million to $13 million. From the results of this test, Duke concludes that the impact on North Carolina retail ratepayers is de minimus.

The Public Staff argues that the test is only "quick and dirty," and should not be applied in this context because the test may be improved with additional time and thought and whatever the results of the test now, the actual impact of allocating costs from the PPA cannot be accurately measured until examined within the context of a general rate case on the basis of known and measurable test year experience.

As indicated above, but for the existence of regulatory conditions requiring Duke to submit prior to implementation wholesale contracts for possible rejection or modification that otherwise would fall exclusively under FERC's jurisdiction and where Duke is forbidden to appeal an adverse decision, the Commission should refrain from addressing future rate impacts arising from such contract implementation. Likewise, as indicated above, any preliminary expression of ratemaking treatment should be made without binding a future Commission. There is merit in the Public Staff argument that facts and circumstances brought to light in a future general rate case of which the Commission currently is unaware may change any preliminary expression of opinion.

Application of the test used by the parties to gauge the impact on North Carolina retail ratepayers of implementing the Orangeburg PPA and allocating costs from the PPA to the wholesale jurisdiction at system average costs imposes additional costs to North Carolina ranging from $6 million to $13 million.

The Blue Ridge/Piedmont test compares the benefits of spreading Duke's generation system fixed costs to additional wholesale sales to Duke's incremental generation costs of supplying those additional sales. Responding to the Public Staff criticism of the test, Duke witness Shrum described the test as simple but "very indicative analysis of, if I add load and I have to add capacity and incremental energy to serve that load, what would be the affect (sic) on North Carolina ratepayers be?" (Tr. Vol. 3, pp. 66-67). Application of the test shows a projected generation component of retail rate impacts from the Orangeburg PPA of 0.024 cents/kWh, which represents a 0.48% change. Duke maintains that the true impact to total cost of service, which includes the transmission and distribution component of rates in addition to generation, is much less. Duke asserts that if the Blue Ridge/Piedmont test is adjusted to reflect the fact that the addition of the Orangeburg load will not require Duke to add new

generation resources, the calculated generation component retail rate impact is 0.004 cents/kWh.

Public Staff witness Maness confirms that Duke's analysis complies with the Public Staff Piedmont/Blue Ridge test, but stresses that the methodology was rough and expedited and never intended to provide assurance for future ratemaking treatment. Mr. Maness testified that before such analysis could be relied upon for future ratemaking, it would need closer examination, refinement and perhaps overall changes to ensure accuracy and precision. However, when asked what refinements might be necessary, Mr. Maness was unable to list any. Tr. Vol. 3, pp. 229-231. Mr. Maness testified that a $6 million annual impact on the North Carolina retail jurisdiction from Orangeburg and $46 million for a 1,500 MW increase in wholesale load, while relatively small in terms of Duke's total annual North Carolina retail cost of service, were still substantial, and would not be, in the opinion of the Public Staff, de minimis.

Based on this evidence and in consideration of the policy issues raised, I conclude that it would have been appropriate at this time to rely upon the Blue Ridge/Piedmont test results to provide Duke and Orangeburg with a preliminary indication that if the Commission were to establish retail rates for Duke today, Duke's costs to serve Orangeburg would be allocated to the wholesale jurisdiction at system average costs as called for in the PPA because the impact on North Carolina retail rates is not so substantial as to justify allocations inconsistent with the PPA. My review of the Public Staff arguments leads me to the conclusion that the Public Staff's greatest concern for a negative impact on retail rates is the addition of wholesale loads in the magnitude of 1,500 MW as opposed to the 200 MW Orangeburg load.[5] My ruling would have been without prejudice to arguments the Public Staff or others might make in the future that the test should be refined or improved or that additional facts and circumstances not presently known have come to light.

While determining preliminarily that the impact of adding the 200 MW of Orangeburg load at system average costs is not substantially harmful to retail customers, and while unwilling to make such a preliminary ruling beyond the facts that the Orangeburg PPA presents, I would have ruled that the Commission would be unwilling to examine future similar notifications, if any, on the basis of the incremental rate impact of the single wholesale contract but would instead examine the cumulative rate impact of all such wholesale contracts. While I disagree with the Public Staff and determine that $6 to $13 million is not sufficiently harmful to deny system average cost allocation, I would be unwilling to disagree that $46,000,000 is harmful. Consequently, I would have held that should Duke undertake to negotiate similar wholesale contracts with the expectation that the Commission will agree to allocate costs to the wholesale jurisdiction on system average costs, it would do so at its own risk.

[5] In its Proposed Order the Public Staff asks the Commission to state: "Although the Commission understands that the dollar impacts calculated in this proceeding are relatively small with regard to Duke's total cost of service, it does not consider incremental North Carolina retail costs of $100,000,000 to be immaterial."

Instrumental in my view on these issues are Duke's submissions in the 2007 IRP as well as the record and order in the Buck and Dan River CPCN proceedings and the Commission's orders in response thereto. In Duke's 2007 IRP, Duke included undesignated wholesale load for planning purposes in addition to known wholesale load for which Duke has already entered into a contract to serve. The undesignated wholesale loads are shown to be 100 MW beginning in 2010, 300 MW in 2011, and 500 MW in 2012 and thereafter. In its order in the Buck and Dan River CPCN cases, the Commission noted that Duke has traditionally planned for forecasted growth in wholesale load in the same way that it has planned for forecasted growth in its retail load. The Commission determined that inclusion of unspecified wholesale load growth as in the 2007 IRP and for purposes of justifying CPCNs was permissible. The Piedmont and Blue Ridge loads of 200 MW now are no longer unspecified. As described by the Public Staff in its proposed order, the net NCMPA load for which Duke potentially is responsible is 121 MW, the net PMPA load is 165 MW and the Saluda River load is 204 MW. Duke insists that wholesale loads such as the Orangeburg 200 MWs was clearly contemplated as part of the undesignated wholesale load in the IRP.

While the parties differ as to which increments of wholesale load constitute the 500 MW of unspecified wholesale load in the 2007 IRP, I am satisfied that if Duke adds the 200 MW of Orangeburg load and perhaps the smaller Greenwood load, the 500 MW identified by Duke and commented upon favorably by the Commission will be met or exceeded. Duke asks for guidance from the Commission as to how the Commission will treat notifications of potential commitments of native load wholesale power at system average costs so it can be better informed as it participates in the wholesale market. While I would be unwilling to issue a declaratory ruling beyond a limited ruling specific to the Orangeburg PPA, I would nevertheless have concluded that should Duke make such commitments exceeding those listed above and in excess of the 500 MW listed in the 2007 IRP and addressed in the CPCN order, the Company would do so at its own risk and with a real and substantial risk that any 7(b) notification would result in contract rejection.

Duke has agreed to regulatory conditions in the Duke-Cinergy merger order that authorize this Commission to regulate its activities as seller in the wholesale market. Duke has requested in this docket guidance as to how the Commission will exercise that authority to provide Duke with information so that Duke can productively conduct its affairs. In my view, the Commission should, to the maximum extent possible, attempt to provide the requested guidance. The Commission should have committed to Duke that it would view with disfavor future notifications in which Duke presents the Commission with wholesale contracts, signed or otherwise, that commit native load priority power priced at system average costs containing escape clauses like those in the Orangeburg PPA where any IRP and/or CPCN approved by the Commission does not contemplate service for such loads.

Duke has represented that it will treat wholesale customers like Orangeburg in its planning process so as to disregard the distinction between retail and wholesale only if the Commission allows Duke to treat such wholesale customers as Duke requests that

its service to Orangeburg be treated. I would have held that the appropriate context within which to first address issues for future wholesale commitments such as those like Orangeburg is the IRP and CPCN proceedings, not notification proceedings such as this. The Commission's jurisdiction over generation resources is clear. Its jurisdiction over wholesale contracts is preempted, and as the issues in this docket make clear, efforts to circumvent FERC's otherwise exclusive jurisdiction through generic orders and regulatory conditions raise numerous difficulties and concerns.

\s\ Edward S. Finley, Jr.
Edward S. Finley, Jr., Chair

Exhibit 3

OFFICIAL COPY

R. Kaylor
$28.00
4-8-11

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: Monday, April 4, 2011

DOCKET NO.: E-7, Sub 980 and E-2, Sub 995

TIME IN SESSION: 10:27 A.M. - 11:01 A.M.

BEFORE: Commissioner Lorinzo L. Joyner, Presiding
Commissioner William T. Culpepper, III
Commissioner Bryan E. Beatty
Commissioner Susan Warren Rabon
Commissioner ToNola D. Brown-Bland
Commissioner Lucy T. Allen

IN THE MATTER OF:

Duke Energy Carolinas, LLC and Carolina Power & Light Company, d/b/a Progress Energy Carolinas, Inc.: Duke Energy's Advance Notice of Joint Dispatch Agreement and Joint Open Access Transmission Tariff with Progress Energy Carolinas, Inc.; and Filing Pursuant to Regulatory conditions 33, 38 and 45 Regarding Proposed Merger with Duke Energy Carolinas, LLC and Transfer of Operational Control of Generation Assets

A P P E A R A N C E S:

FOR DUKE ENERGY CAROLINAS, LLC:

Robert W. Kaylor
Robert W. Kaylor, P.A.
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Raleigh, North Carolina 27612

FOR PROGRESS ENERGY CAROLINAS, INC.:

Kendal Bowman
Progress Energy
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A P P E A R A N C E S (Continued):

FOR THE USING AND CONSUMING PUBLIC:

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Public Staff - North Carolina Utilities Commission
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FOR NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION:

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North Carolina Electric Membership Corporation
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P R O C E E D I N G S

COMMISSIONER JOYNER: We're ready to come to order. Since we are in a -- we're going to deal with a different docketed matter, I again inquire now in compliance with the requirements of the State Government Ethics Act whether any member of the Commission has a known conflict with respect to the matters we're scheduled to consider at this time?

(No response.)

Let the record reflect that no conflicts have been identified.

I now call for -- for argument Docket No. E-7, Sub 980 and Docket No. E-2, Sub 995. On February 14th, 2011, Duke Energy Carolinas, pursuant to Regulatory Condition 59(b) as approved in the Commission's Order Approving Merger Subject to Regulatory Conditions and Code of Conduct in Docket No. E-7, Sub 795, filed advance notice pursuant to several regulatory conditions of its intent to transfer independent operational control of its generating facilities -- generation facilities to combined operational control pursuant to a Joint Dispatch Agreement with Progress Energy Carolinas and to request that the Federal Energy Regulatory Commission approve a new joint Open Access Transmission Tariff covering the balancing

authority areas for both Duke and Progress.

On February 14, 2011, Progress also filed notice pursuant to Regulatory Conditions 33, 38 and 45 as approved in the Commission's Order Adopting Revised Regulatory Conditions and Code of Conduct in Docket No. E-2, Sub 844 of the proposed merger and its intention to transfer operational control of the Company's generation assets to Duke.

By Order entered in these dockets on March 2, 2011, the Commission found good cause upon notice -- upon motion -- I'm sorry -- of the Public Staff to extend the time for the Public Staff to file its responses in both dockets until March 15, 2011, and to extend the advance notice periods in both dockets until Wednesday, March 30, 2011.

On March 15th, 2011, the Public Staff filed an Objection, Statement of Position and Motion in these dockets whereby the Commission was requested to enter an order extending the advance notice periods until further order by the Commission.

By Order entered on March 18th, the Commission found good cause to extend the advance notice periods as requested by the Public Staff and to grant the Public Staff's request that it be allowed to present these

matters at a Commission Staff Conference no later than Monday, April 4, 2011.

On March 24, 2011, the Commission Staff was orally advised by counsel for and on behalf of Duke, Progress and the Public Staff that those parties were in negotiations in an attempt to resolve the March 15th objection filed by the Public Staff. The parties, through counsel, also advised the Commission Staff that they were hopeful that they would be able to satisfactorily resolve the issues raised by the Public Staff and that the matters would be -- that the Public Staff would file its recommendations on Monday, March 28 rather than present these matters at the Commission regular Staff Conference.

On March 28, 2011, at the request of Duke, Progress and the Public Staff, the Commission issues -- issued its Order extending the time for the Public Staff to file its recommendations until noon on Friday, April 1st, and scheduling these matters for consideration immediately following the regular Commission Staff Conference on -- today, April 4th.

The Public Staff timely filed its recommendations on April 1. In its filing, the Public Staff stated that the Public Staff, Duke and Progress had satisfactorily resolved the issues raised by the Public

Staff's objection and are now in agreement as to the form of the proposed joint dispatch agreement and to certain conforming changes to the merger application. The revised proposed joint dispatch agreement was attached to the Public Staff's recommendation as Appendix A.

As now drafted, the Public Staff stated that it believes the Commission's jurisdiction has been protected as much as possible from the preemption risks associated -- risks raised by it being filed with the FERC and that the filing of the proposed joint dispatch agreement and the conformed merger application would be in accordance with the relevant regulatory conditions.

Further, the Public Staff stated that by recommending that Duke and Progress be allowed to file the proposed joint dispatch agreement and the merger application premised thereon, no position was being taken by the Public Staff as to whether or not it is appropriate for Duke and Progress to enter into the proposed agreement or as to whether the merger or the agreement would be in the best interest of its ratepayers.

The Public Staff stated the current form of the agreement was agreed to by the Public Staff solely for the purpose of allowing the Public Staff to recommend to the Commission that Duke and Progress be allowed to file it

with the FERC.

The other parties to this proceeding include the North Carolina Attorney General's office, the North Carolina Utility Customers Association, Carolina Industrial Group for Fair Utility Rates II and the North Carolina Electric Membership Corporation.

That brings us to the matter before us. Just so the record is clear, I am going to ask that the parties make their appearances for the record. We are going to treat this in the nature of an agenda item, with the Public Staff making the presentation, so I guess, Ms. Rankin, we'll start with you for appearance purposes.

MS. RANKIN: I am Gisele Rankin, an attorney with the Public Staff appearing on behalf of the Using and Consuming Public.

MR. GREEN: Good morning. I'm Len Green with the North Carolina Attorney General's office appearing on behalf of the consumers.

MR. FEATHERS: Good morning. I'm Rick Feathers appearing on behalf of North Carolina Electric Membership Corporation.

MR. KAYLOR: Good morning, Madam Chair, members of the Commission. Robert Kaylor appearing on behalf of Duke Energy Carolinas.

MS. BOWMAN: Good morning, Commissioners. Kendal Bowman appearing on behalf of Progress Energy Carolinas.

COMMISSIONER JOYNER: Thank you, ladies, gentlemen.

Ms. Rankin, you can proceed with your presentation.

MS. RANKIN: The one thing that I thought that you might want to hear that wasn't detailed in the recommendation that we filed was the -- generally the nature of the changes that we made to the agreement as originally given to us.

COMMISSIONER JOYNER: Thank you. That was one of the first questions I had.

MS. RANKIN: It -- it went back and forth a number of times and I'm not even going to try to -- to talk about all the -- the -- the order of it or the various things, but I am going to summarize generally.

One of the first things was that we made it so that it would be filed unexecuted. As originally proposed, they would sign it and then file it with the FERC. It will now be unexecuted. And it also now says that it will have no effect if the merger is not consummated.

It also says that the effectiveness of the agreement is subject to and conditioned upon all approvals being obtained from state and federal regulatory authorities, both to consummate the merger and to enter into the Joint Dispatch Agreement.

A very messy issue is the extent to which the Joint Dispatch Agreement could be considered to fall under 16 USC Section 824(a)-1, which allows the FERC on its own motion or upon the application of any person or governmental entity to exempt electric utilities from state laws and rules and regulations to the extent they prohibit or prevent the voluntary coordination of electric utilities, including any agreement for central dispatch, if the FERC determines that such voluntary coordination is designed to obtain economical utilization of facility and resources in any area. The FERC can't grant such exemption if the state law was designed for the purpose of protecting the welfare of public safety, et cetera, et cetera.

Until about 2004, 2005, everybody thought that that meant regular state regulation could not be exempted. But in a proceeding involving AEP attempting to join PJM, the FERC actually preempted the Virginia Commission and the Kentucky Commission when they tried to impose

conditions on AEP joining PJM.

As a result, to try to make sure that the Joint Dispatch Agreement wasn't considered to fall within this statute and put us subject to that risk, we took out any reference to coordination. We took out references to centrally dispatching. We also took out that -- I think -- for -- you know, references to maximizing efficiency, the -- the sorts of things that are in this statute. The real purpose of the agreement is not those things. It is to run the two sets of generation to the benefit of their retail native load customers and their wholesale customers with native load priority, to reduce their cost.

And they -- they've -- they've -- I don't think they were trying to bring -- it was in the statute, obviously, but they had picked up language from other integration agreements and other sorts of things like this and they voluntarily struck it so as to improve our position if something were to happen down the road.

We also inserted definitions of native load priority, retail native load customers, just things to make it clear what those were. We used the definitions from the prior merger orders so as to make -- to tie them all together.

We also specified that the joint dispatcher

would be Duke, which was the original proposal, but the very first draft had an agent doing the dispatching. And that's kind of the standard way they do it in the integration agreements. In this case, it's going to be Duke.

And to be real clear, Progress will continue to physically dispatch its generating units. It will just do it in the order that it's told by the person who's looking at the economics of the unit, looking at both stacks at the same time. And physically it will be done by Progress and Duke separately. Duke will just then be telling them which one to turn on or which one to turn off based on the load and the economics of the two sets of plants.

Because the FERC has jurisdiction over a system integration agreement, lots of jurisdiction -- when -- when a utility's sisters and brothers and a registered holding company's system plan together -- and they used to have to because CUCA, 1935, required integration before utilities could become affiliates -- FERC has an enormous amount of jurisdiction over who builds plants, how the megawatts and megawatt hours are allocated.

The Entergy system and the mess that they've had over the last ten years is an excellent example from a state regulator's point of view of why you might not want

FERC to be telling your utilities exactly how they're going to operate. The end result of that mess is that Entergy Arkansas and Entergy Mississippi have given the eight-year notice that's required and they are getting out of the joint agreement.

We tried to avoid even setting this up like that from the beginning so that we wouldn't have that kind of complication to deal with. To achieve that, we took out the definition of -- for combined system load and all references to combined. And we wanted it very clear that this is two separate systems, they're just doing this one thing together to produce savings for their customers, native load customers.

We added some definitions such as balancing authority and balancing authority area, which is the NERC new names for control area, to make it clear that the transmission systems aren't being combined or run together. They will stay separate in terms of their transmission systems.

When they -- when they actually use each other's energy, it will be treated as a wholesale sale and they'll be using point-to-point service under their Open Access Transmission Tariff. So it -- it -- the base transmission is not being put together, which is a very important

point. And it was something we didn't know at the beginning, yet we didn't understand that until we got further into it.

We also added a Section 3.2(a), that nothing in the agreement is intended to or shall be construed to provide for or require a single integrated electric system, a single balancing area authority control area or transmission system, joint planning or joint development of generation or transmission, equalization of the parties' production cost or rates. It also -- nothing in the agreement is to be construed as transferring any rights to generation or transmission from one party to the other. We added a section that provides that to the extent the parties desire to engage in any of those activities, plan together, build generation together or whatever, they either have to amend the agreement or enter into a separate agreement, and that would be subject to the applicable state and federal authority being given.

We also added Section 5.2(a) through (c), that Duke's and PEC's separate obligations to plan for and provide least cost service to its retail native load customers would remain separate and that there are separate obligations to serve their native load customers with the lowest cost power each can generate or purchase

before making power available for non-native load sales. That's been explicitly put into the agreement.

And then finally, the Section 7 deals with how the savings are to be allocated. And basically the way they're doing that is they're going to figure out what Progress' cost would have been alone and what Duke's cost would have been alone, and then to the extent that Progress generated less than its load, that incremental difference will be a wholesale sale. And it -- it was very important to me that the entire set of arrangements didn't become a wholesale sale and purchase back and forth. So the agreement explicitly states that it's only that incremental. It's only -- the difference is at the top that become a wholesale sale between the two of them. That keeps the rest of it bundled retail and -- you can't really see this by glancing at it because that Article 7 is very complicated.

COMMISSIONER JOYNER: Ms. Rankin, some of us don't have Article 7.

MS. RANKIN: Did you not get -- I filed late on Friday a reformatted agreement. Auto-formatting really messed it up.

COMMISSIONER JOYNER: And that may be the problem --

MS. RANKIN: I think that is probably what it is.

COMMISSIONER JOYNER: -- but several of us --

MS. RANKIN: Between 4 and 7 -- it's the one that's labeled 6 in what I filed at noon --

MS. BOWMAN: The title would be the "Calculation of Joint Dispatch Savings."

MS. RANKIN: Savings. And the very first section is "Overview."

COMMISSIONER JOYNER: Yes.

MS. RANKIN: That's Article 7. That's one thing that the auto-formatting did. I should have mentioned that at the beginning. I filed a reformatted one like at 4:55 after we realized what had happened. For some reason from Article 4 to Article 7 it messed up the -- the numbering.

COMMISSIONER JOYNER: Okay. I'm sorry to interrupt.

MS. RANKIN: That's quite okay. I would rather you know where I'm -- I'm talking about.

And as you said, we haven't signed off on this way of calculating the savings. We'll -- we'll investigate that in the merger proceeding. The only thing we did at this point was to try to make sure we protected

ourselves from preemption to the maximum extent possible. Whether we actually like the way they've allocated the savings will be subject to the full investigation in the merger proceeding.

And finally, a section was inserted, which I think under all versions is Article 8, since the -- the problem was before 7, that basically allows them to sell capacity in an hour if they need it for reliability purposes, but it is subject to the selling party having the capacity and being able to sell it without interfering with their own retail customers' and native load wholesale customers' reliable service or service quality. In other words, one couldn't curtail in order to provide capacity to the other one.

And that -- that's the vast majority of the changes, I believe. There were other smaller ones, but...

COMMISSIONER JOYNER: And I've got to ask you -- I've got to go back to the auto- --

MS. RANKIN: Formatting.

COMMISSIONER JOYNER: -- formatting issue. If what originally was labeled on the copy I have "Calculation of Joint Dispatch Savings" as Article 6, that should be Article 7, then where is Article 6?

MS. RANKIN: It's the one that is labeled

Article 5.

COMMISSIONER JOYNER: Okay.

MS. RANKIN: Article 4 -- the one labeled Article 4 is actually 5, and the one labeled 5 is 6, the one labeled 6 is 7. And for some unknown reason, Article 4 is labeled 7. We had a dropped auto-formatter going on here, I believe.

COMMISSIONER JOYNER: And ultimately at the end of the day Friday --

MS. RANKIN: I filed a --

COMMISSIONER JOYNER: -- you filed a corrected --

MS. RANKIN: Yes. And then the only error that we found in it afterwards was that in Article 4, which is 4.1 instead of 3.3 which shows here, the A, B, C, D, E was -- I believe it was C, D, E, F and G and that obviously should be A, B, C, D. It really was -- it changed, I swear, as I went through the document so that I -- I couldn't catch it all. I just kept going back and forth.

But other than that, I think it's all corrected in the -- in the one we filed late. And it is labeled Reformatted Appendix A. And it has the correct numbers, except with that one exception.

It still needs some changes to the table of

contents, and it's purely formatting. And I've also been told that it should be between Carolina Power Lighting Company, because that's the legal name and that's what FERC uses, but other than that, it's -- there should be no other changes in what needs to be filed at FERC. That -- and your approval ought to be that they can fix the formatting before they file it at FERC. But no other changes, of course.

COMMISSIONER JOYNER: Okay.

MS. RANKIN: That concludes my...

COMMISSIONER JOYNER: I have a couple of questions of Ms. Rankin, but I will entertain, first, questions from my colleagues.

(No response.)

All right, Ms. Rankin. I know that I am looking at the incorrectly formatted Joint Dispatch Agreement. And I am looking at page -- what is then page 7 under the caption Article (sic) Supply Resources and Non-Native Load Sales. I'm phrase -- to designate it as an article, okay?

MS. RANKIN: Yours says 6, correct? No, no.

COMMISSIONER JOYNER: No. Actually mine is --

MS. RANKIN: It should be 6 --

COMMISSIONER JOYNER: I've got -- mine says --

MS. RANKIN: -- the corrected one.

COMMISSIONER JOYNER: -- 5, that's why --

MS. RANKIN: Okay.

COMMISSIONER JOYNER: -- I decided I would --

MS. RANKIN: Right.

COMMISSIONER JOYNER: -- give you the --

MS. RANKIN: I just want to make sure I was in the caption. It's "Power Supply Resources and Non-Native Load Sales."

COMMISSIONER JOYNER: And there is 5.1, 5.2, 5.3 and then we turn the page and we go from page 8 to 6.4 and 6.5.

MS. RANKIN: Correct. And which -- and those all should be --

COMMISSIONER JOYNER: Fives.

MS. RANKIN: Fives. Or 6, as I read the --

COMMISSIONER JOYNER: But that there is a numbering --

MS. RANKIN: Whatever it is --

COMMISSIONER JOYNER: -- issue --

MS. RANKIN: -- yes.

COMMISSIONER JOYNER: -- yeah -- that you will take care of?

MS. RANKIN: Yeah.

COMMISSIONER JOYNER: Do you see what on mine is

5.3, "New Short-Term Power Purchases"?

MS. RANKIN: Yes.

COMMISSIONER JOYNER: A, little I?

MS. RANKIN: Yes.

COMMISSIONER JOYNER: That appears to me to say in pertinent part that costs that are not economic to either party can be flowed through to ratepayers. And what I look at is if a new short-term power purchase is determined after the fact to have been economic to both parties or to neither party, then each party shall be allocated. Am -- am I misreading that?

MS. RANKIN: You're reading it correctly. It -- this is just between the two of them. For retail ratemaking purposes, you can disallow it --

COMMISSIONER JOYNER: Okay.

MS. RANKIN: -- if it's imprudent or unreasonable. The reason it's in there, as I understand it, is because you could -- the person sitting in the room looking at the load and the generation could make a purchase for an hour, six hours, whatever, and then the weather could be such -- a thunderstorm could come in and then they might not need the power that they just bought because the weather changed. In that case, when you look on -- at it after the fact, it wouldn't be economic to

either party because they didn't need it. It -- they -- they weren't going to have to turn anything on and they didn't need the power, which looked like it was going to be cheaper than the next thing that they would turn on, and between them they just share it -- it -- it -- because it's a change. If it happened all the time and it was enough money, you could disallow it for ratemaking purposes.

COMMISSIONER JOYNER: Okay. On page 14, "Compliance --

MS. RANKIN: Yes.

COMMISSIONER JOYNER: -- With NCUC Regulatory Orders." A begins, "To the extent if Joint Dispatch under this Agreement." And that -- it seems like either "to the extent" or "if." It looks like it ought to be "if," quite frankly --

MS. RANKIN: Yes.

COMMISSIONER JOYNER: -- it looks like, "to the extent."

MS. RANKIN: It should be one or the other, not both.

COMMISSIONER JOYNER: Right.

MS. RANKIN: I agree.

COMMISSIONER JOYNER: And is that the same with

B?

MS. RANKIN: Yes.

COMMISSIONER JOYNER: Okay.

MS. RANKIN: I imagine we put one of them in and forget to take the other one out.

COMMISSIONER JOYNER: In your recommendation or comments, something I've seen from the Public Staff acknowledges that our decision in these dockets would also constitute approval of the filing of the Open Access Transmission Tariff.

MS. RANKIN: That's how Duke filed. I mean, I think you could interpret their advance notice to include the joint (sic) access transmission tariff, the OATT. We haven't included it because bundled retail does not take service under the OATT. We're -- we're not subject to it. And the way it ended up being contemplated that this would occur, there is nothing in the joint OATT itself that should change your authority in any way. But to start with, it wasn't clear.

COMMISSIONER JOYNER: Okay.

MS. RANKIN: As it evolved and with the extra provisions we put in the Joint Dispatch Agreement saying that they would keep their own separate balancing area authorities or controlled areas and that it -- just the

top would be a wholesale sale, just the incremental purchases back and forth, the -- we don't need to do anything with the -- the OATT, the joint OATT with the way it developed.

COMMISSIONER JOYNER: Do Progress or Duke need Commission approval prior to the actual filing of the OATT with FERC?

MS. RANKIN: I don't think so.

COMMISSIONER JOYNER: Okay. And that's why you would be signing --

MS. RANKIN: Not given -- exactly.

COMMISSIONER JOYNER: -- a proposed order?

MS. RANKIN: Not given the way this turned out. After it was explained to us, we did not think it needed to be included.

COMMISSIONER JOYNER: And I will invite counsel for Progress and for Duke to add any comments you think might be helpful.

MS. BOWMAN: I would agree with everything Ms. Rankin just said. We agree that the Progress Energy Carolinas' and Duke Energy Carolinas' retail native load does not take service under the OATT, so therefore there's -- there is no jurisdictional implications here.

COMMISSIONER JOYNER: Okay. If Duke and

Progress file the proposed Joint Dispatch Agreement with FERC, what would happen if the Commission required amendments to that agreement as a condition of its decision on the actual merger application?

MS. RANKIN: Well, the agreement allows them to terminate the merger. The -- the whole idea is that it's subject to FERC approving it and you approving it and South Carolina approving it without material modification. If you materially modified it, they would have to consider whether or not it was, you know, still worth going forward with.

It's -- it's going to be complicated because anything the FERC did to it could change the cost benefit study analysis and the outcome. Anything you did to it can change the cost benefit study analysis. So it's going to be a little irritant in terms of figuring it all out. But jurisdictionally, your ability to order them to change it is preserved.

COMMISSIONER JOYNER: Okay.

MS. RANKIN: And then whether they continue it or not would be up to them. And you may very well -- if the FERC required it to be changed, you would want to consider whether or not changes needed to be made, and that -- your ability to do that is preserved.

COMMISSIONER JOYNER: Okay. Further questions from the Commission? And, quite frankly, if our staff have any additional questions, now would be, in my view, an appropriate time for them to put them on the table.

(No response.)

Any of the other parties wish to be heard with respect to this item? Mr. Green? Mr. Feathers?

MR. GREEN: The Attorney General's office does not oppose the filing and the commissions allowing the filing of the Joint Dispatch Agreement.

COMMISSIONER JOYNER: Okay. Mr. -- I'm sorry, Commissioner Beatty.

COMMISSIONER BEATTY: Is now the appropriate time for a motion?

COMMISSIONER JOYNER: Yes.

COMMISSIONER BEATTY: I move that we approve the recommendation of the Public Staff.

(Discussion off the record.)

COMMISSIONER BEATTY: All right. Then I move we move it upstairs.

COMMISSIONER JOYNER: Thank you, Commissioner Beatty. There is a motion that we take this to -- to executive conference. Before I ask my colleagues for further discussion or questions, I'm -- I'm going to ask

the Public Staff to refile, if necessary -- having not had a chance to look at what you refiled, I don't know whether it takes care of at least those -- those three or four issues that I pointed out today, but if you could refile --

MS. RANKIN: I'll be glad to refile.

COMMISSIONER JOYNER: -- so that -- that we have before us the -- what is really on the table with respect to the Joint Dispatch Agreement, that will be useful. And since we don't need joint proposed orders or anything else like that --

MS. RANKIN: I attached a proposed order to --

COMMISSIONER JOYNER: I know you did. I -- my point is we don't need you to do anything else --

MS. RANKIN: To the --

COMMISSIONER JOYNER: -- with respect to that.

Any additional questions, further discussion on the motion that we take this into executive conference?

(No response.)

The motion carries. We will take this matter under advisement. We appreciate the work that all the parties have done. We are adjourned.

(WHEREUPON, THE ITEM WAS TAKEN TO EXECUTIVE CONFERENCE.)

Whereupon, the hearing was adjourned.

CERTIFICATE

The undersigned Court Reporter certifies that this is the transcription of notes taken by her during this proceeding and that the same is true, accurate and correct.

Candace Covington
Court Reporter II

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2011-158-E

In the Matter of: Application Regarding the Acquisition of Progress Energy, Incorporated by Duke Energy Corporation and Merger of Progress Energy Carolinas, Incorporated and Duke Energy Carolinas, LLC	**CERTIFICATE OF SERVICE**

I, Pablo O. Nüesch, hereby certify that I have caused the Direct Testimony of John Bagwell on behalf of the City of Orangeburg, South Carolina to be served on the parties listed below by first-class mail, postage prepaid, or electronic mail:

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